CHAPTER 7

The Members

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The Members

A. INTRODUCTORY

§ 1. In General; Rights and Privileges; Term of Office

Membership in the House of Representatives entitles the Members to compensation, to miscellaneous privileges and allowances, and to immunities protecting their independence and integrity. But a Member-elect must first satisfy the House that he has met all the qualifications for membership required of him. Those rights, immunities, and qualifications are the subject of this chapter.(1)

Ancillary matters dealing primarily with parliamentary procedure, such as questions of privilege relating to Members,(2) are treated elsewhere.

The qualifications for membership, are mandated by the United States Constitution.(3) Members' allowances and the methods of disbursement thereof are governed by statute, principally title 2 of the United States Code. Other matters relating to Members, such as seniority and derivative rights, are based on the custom and practice of the House.

The term of office for a Member is mandated by the 20th amendment to the Constitution to begin on Jan. 3 of the odd-numbered year for which elected, and to extend for two years to noon on Jan. 3 of the next odd-numbered year.(4) Prior to the ratification of the amendment, the terms of

1. Delegates and Resident Commissioners enjoy in full or in part the rights and duties arising from congressional membership. Their status is analyzed specifically in § 3, infra, and other sections refer to them where applicable.

2. For privilege, see Ch. 11, infra.

3. See U.S. Const. art. I, § 2, clause 2.

4. Section 1 of the amendment, ratified in 1933, states that the terms of Senators and Representatives shall end "at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified", and section 2 states that the first assembly of a Congress "shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." For commentary on the provisions, see *House Rules and Manual* § 6 (comment to U.S. Const. art. I, § 2, clause 1) and § 279 (comment to amendment 20) (1973).

Members had begun on Mar. 4 of the odd-numbered years and terminated on Mar. 3 two years later.[5] If Congress assembles for its first session after Jan. 3, Representatives-elect receive salary from Jan. 3 if credentials have been filed with the Clerk of the House.[6]

Under the Code of Official Conduct, a Member is prohibited from accepting any gift of substantial value from any person or organization having a direct interest in legislation.[7] A Member is required to disclose the amounts of any gifts received for campaign expenditures, which are likewise regulated and must be kept separate from personal funds under the code.[8] In relation to "honorariums," a Member is prohibited from accepting more than the usual and customary value thereof,[9] and he is required to disclose honorariums from a single source aggregating $300 or more.[10]

By statute, Congress has consented, pursuant to article I, section 9, clause 8, to the acceptance by a federal employee of a foreign decoration awarded him, subject to the approval of the division of the government in which he is employed and the concurrence of the Secretary of State.[11] When

5. A joint committee of the First Congress determined that under a resolution of the Continental Congress (First Congress to meet on Mar. 4, 1789) and under U.S. Const. art. I, § 2, clause 1 (Members to be chosen every second year), the terms of Representatives and Senators of the first class commenced on the 4th of March and terminated two years later on Mar. 3 (see 1 Hinds' Precedents §§ 3, 11). That construction was followed until the adoption of the 20th amendment.

6. 2 USC § 34.

7. Rule XLIII clause 4, *House Rules and Manual* § 939 (1973).

The Code of Conduct was adopted in the 90th Congress (see § 1.1, infra). For matters relating to the Code of Conduct, see Ch. 12, infra.

8. Rule XLIII clauses 6, 7, *House Rules and Manual* § 939 (1973). For disclosure of campaign expenditures, see Ch. 8, infra.

9. Rule XLIII clause 5, *House Rules and Manual* § 939 (1973) prohibits Members from receiving more than the "usual and customary value" for making a speech, writing for publication, or other similar activity. The rule was adopted in the 90th Congress (see § 1.1, infra).

10. Rule XLIV, part A, clause 3(d) (financial disclosure), *House Rules and Manual* § 940 (1973). The portion of the rule relating to disclosure of honorariums was adopted in the 91st Congress (see § 1.2, infra).

11. 5 USC § 7342(d) approves a decoration "tendered in recognition of active field service in time of combat operations or awarded for other outstanding or unusually meritorious performance." In the absence of the requisite approval and concurrence,

such an award is tendered to a Member of the House, it is the Speaker's function to approve or disapprove of the accepting and wearing of the award.[12] In one instance where the Speaker himself was tendered such an award, a private law was enacted so as not to place him in the position of reviewing his own application.[13]

An incidental privilege drawn from statute is the right of a Member, Delegate, and the Resident Commissioner to nominate persons for appointment to the United States military academies.[14] Their power extends to nominating alone, as the power to appoint is held by the President.[15]

Since 1964, each Congressman has been entitled to a maximum quota of five nominated positions in each of the academies at any one time.[16] The Delegate from the District of Columbia and the Resident Commissioner from Puerto Rico are entitled to nominate for five openings,[17] and the Delegates from Guam and the Virgin Islands are entitled to nominate for one opening.[18] Members may request from the secretary of the respective branch of the armed services the name of the

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the decoration must be deposited as the property of the United States. See 22 USC § 2625 for the disposal of nonapproved decorations.

12. See *House Rules and Manual* § 159 (comment to U.S. Const. art. I, § 9, clause 8) (1973).

13. See § 1.4, infra.

14. The principle provisions are 10 USC § 4342 (United States Military Academy), 10 USC § 6954 (United States Naval Academy), and 10 USC § 9342 (United States Air Force Academy).

For an occasion where a Member resigned from the House under threat of expulsion for allegedly having sold appointments to military academies, see 2 Hinds' Precedents § 1273. The House excluded him when he was re-elected to the same Congress (1 Hinds' Precedents § 464).

15. "All cadets are appointed by the President." 10 USC § 4342(d); 10 USC § 9342(d). "Midshipmen at the Naval Academy shall be appointed by the President alone." 10 USC § 6953. The latter provision was passed on Aug. 10, 1956, 70 Stat. 429, Ch. 1041, to make clear that the appointment power rested in the President alone. See note to 10 USCA § 6953.

See also *Walbach* v *U.S.*, 93 Ct. Cl. 494 (1941), holding that Members of Congress have no power of appointment to the Military Academy, but can only nominate for positions.

16. 10 USC § 4342(a)(4) (Military Academy); 10 USC § 6954(a) (4) (Naval Academy); 10 USC § 9342 (a) (4) (Air Force Academy).

17. 10 USC § 4342(a) (5), (7) (Military Academy); 10 USC § 6954(a) (5), (7) (Naval Academy); 10 USC § 9342(a) (5), (7) (Air Force Academy).

18. 10 USC § 4342(a) (6), (9) (Military Academy); 10 USC § 6954(a) (6), (9) (Naval Academy); 10 USC § 9342(a) (6), (9) (Air Force Academy).

Congressman or other nominating authority responsible for the nomination of a named individual to an academy.[19]

The Members are also allotted quotas for nomination of persons to the Merchant Marine Academy, depending on state population.[20]

Cross References

Rights and status of Members before being sworn, see Ch. 1, supra (assembly of Congress) and Ch. 2, supra (enrolling Members and administering the oath).

Number and apportionment of Members, see Ch. 8, infra.

Rights and duties of Members in committees, see Ch. 17, infra.

Conduct, punishment, censure, and expulsion of Members, see Ch. 12, infra.

Status of Members-elect and Delegates-elect, see Ch. 2, supra.

Resignation of Members, see Ch. 37, infra.

Personal privilege of Members, see Ch. 11, infra.

Elections and campaigns of Members, see Ch. 8 and Ch. 9, infra.

Party organization and Members, see Ch. 3, supra.

Collateral Reference

Senate Report, Armed Services Committee, Report Relating to the Nomination and Selection of Candidates for Appointment to the Military, Naval, and Air Force Academies, 88th Cong. 2d Sess. (1964).

19. 10 USC § 4342(h) (Military Academy); 10 USC § 6954(e) (Naval Academy); 10 USC § 9342(h) (Air Force Academy).

20. See 46 USC § 1126(b)(1).

Gifts, Awards, and Honorariums

§ 1.1 The House adopted in the 90th Congress a standing rule restricting the acceptance of gifts and honorariums by Members.

On Apr. 3, 1968, the House passed House Resolution 1099, reported from the Committee on Standards of Official Conduct, providing for a Code of Official Conduct to become part of the rules of the House.[1] Clause 4 of the resolution prohibited a Member (or officer or employee of the House) from accepting a gift of "substantial" value from persons, corporations, or organizations having a direct interest in legislation before Congress.[2] Clause 5 of the resolution prohibited a Member (or officer or employee of

1. 114 CONG. REC. 8811, 90th Cong. 2d Sess. Debate on the resolution begins at p. 8777.

2. Rule XLIII clause 4, *House Rules and Manual* § 939 (1973). When the House was considering the resolution, Charles M. Price (Ill.), Chairman of the Committee on Standards of Official Conduct, explained clause 4 at 114 CONG. REC. 8878.

the House) from accepting an honorarium in excess of the usual and customary value of such services.(3)

§ 1.2 The House amended in the 91st Congress the rules relating to financial disclosure to require disclosure by Members of certain honorariums.

On May 26, 1970, the House passed House Resolution 796, reported by the Committee on Standards of Official Conduct, amending standing Rule XLIV on financial disclosure.(4) One section of the resolution amended paragraph 3 of part A of Rule XLIV by adding the requirement that Members (or officers and employees of the House) disclose honorariums from a single source aggregating $300 or more.(5)

3. Rule XLIII clause 5, *House Rules and Manual* § 939 (1973). The Chairman of the Committee on Standards of Official Conduct explained clause 5 at 114 CONG. REC. 8778, 8779.
4. 116 CONG. REC. 17020, 91st Cong. 2d Sess. Debate on the resolution begins at p. 17013.
5. Rule XLIV, part A, clause 3(d), *House Rules and Manual* § 940 (1973). Charles M. Price (Ill.), Chairman of the Committee on Standards of Official Conduct, explained the amendment at 116 CONG. REC. 17014.

Receipt of Foreign Awards

§ 1.3 Before Congress consented by statute to the acceptance by federal employees of foreign decorations,(6) the House practice was to pass bills authorizing named Members to accept and wear awards tendered by foreign governments.

On July 23, 1956,(7) the House passed H.R. 12358, discharged from the Committee on Foreign Affairs. The bill authorized four Members of the House to accept and wear the award of the Cross of Grand Commander of the Royal Order of the Phoenix, tendered by the Government of the Kingdom of Greece. The bill also provided that notwithstanding contrary provisions of the United States Code, the said Members could

6. By the Foreign Gifts and Decorations Act of 1966, Pub. L. No. 89–673, 80 Stat. 952, as amended, Pub. L. No. 90–83, 81 Stat. 208 (codified as 5 USC § 7342), Congress has granted its consent to the accepting, retaining, and wearing by a federal employee of a decoration tendered in recognition of active field service or awarded for other outstanding or unusually meritorious performance, subject to the approval of his employer and to the concurrence of the Secretary of State.
7. 102 CONG. REC. 14121, 14122, 84th Cong. 2d Sess.

wear and display such decorations.

Similarly, on July 25, 1956,[8] the House passed H.R. 12396 authorizing a Member to accept and wear the award of the medal for distinguished military service, tendered by the President of the Republic of Cuba

Again, on July 25, 1956,[9] the House authorized by H.R. 12408 two Members of the House and an ambassador to accept and wear the award of the Order Al Merito della Republica Italiana tendered by the Government of the Republic of Italy.

§ 1.4 Where the Speaker was tendered a decoration from a foreign country, the House agreed to a joint resolution authorizing him to accept and wear the decoration, in order to avoid a conflict of interest.

On Dec. 21, 1970,[10] the House passed House Joint Resolution 1420, authorizing Speaker John W. McCormack, of Massachusetts, to accept and wear an award conferred by the Government of the Republic of Italy. The resolution stated in section 2 that the Speaker could wear and display the decoration notwithstanding 5 USC § 7342 or any other provision of law to the contrary.

Parliamentarian's Note: 5 USC § 7342 provides for the granting of the consent of Congress to officers and employees of the government to accept certain gifts and decorations from foreign governments under enumerated conditions. Under section 6 of that statute, the Speaker must approve the presentation of such awards to Members of the House. In this instance the House passed the resolution to avoid a possible conflict wherein the Speaker would approve an award to himself.

Communications With Executive Branch

§ 1.5 The Committee on Standards of Official Conduct, under authority of the House rules, has issued guidelines for Members and employees in communicating with federal agencies on constituent matters.[11]

8. 102 CONG. REC. 14557, 14558, 84th Cong. 2d Sess.

9. 102 CONG. REC. 14564, 84th Cong. 2d Sess.

10. 116 CONG. REC. 43068, 91st Cong. 2d Sess.

11. Under Rule XI clause 19(e) (4), House Rules and Manual § 720 (1973), the Committee on Standards of Official Conduct may issue, on request, advisory opinions with respect to the general propriety of any cur-

On Jan. 26, 1970, Charles M. Price, of Illinois, the Chairman of the Committee on Standards of Official Conduct, inserted in the Record an advisory opinion which established guidelines for Members and employees in communicating with departments and agencies of the executive branch in relation to problems and complaints of constituents.(12)

Standing of Member-elect to Sue House Officer

§ 1.6 The Speaker announced the institution of a suit by an excluded Member-elect to enjoin the Speaker and other defendants from enforcing the resolution excluding the plaintiff from the House, and seeking a writ of mandamus directing the Speaker to administer him the oath of office as a Member of the 90th Congress.

On Mar. 9, 1967,(13) Speaker John W. McCormack, of Massachusetts, informed the House that a summons had been issued, in connection with a suit brought by Mr. Adam C. Powell, Jr., of New York, and by other parties plaintiff, against Mr. McCormack and against the following Members and officers of the House: Carl Albert, of Oklahoma, Majority Leader, Gerald R. Ford, of Michigan, Minority Leader, Mr. Emanuel Celler, of New York, Mr. Arch A. Moore, Jr., of West Virginia, W. Pat Jennings, Clerk, Zeake W. Johnson, Jr., Sergeant at Arms, and William M. Miller, Doorkeeper.

The summons and the complaint were inserted in the *Congressional Record*.(14) The summons prayed for an injunction against enforcement of House Resolution 1 of the 90th Congress, excluding Mr. Powell from the House of Representatives, and sought a writ of mandamus directing the Speaker to administer Mr. Powell the oath of office as a Member of the Congress.(15) The Supreme Court later held, in the final determination of the suit referred to by the Speaker, that Mr. Powell was improperly excluded from the House.(16)

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rent or proposed conduct of a Member or employee.

12. 116 CONG. REC. 1077, 91st Cong. 2d Sess.; see also Ch. 12, infra.

13. 113 CONG. REC. 6035, 90th Cong. 1st Sess.

14. *Id.* at pp. 6035–40.

15. *Id.* at p. 6038.

16. *Powell* v *McCormack*, 395 U.S. 486 (1971), discussed in § 9, infra.

For other briefs and memoranda relating to the suit brought by Mr. Powell, see 113 CONG. REC. 8729–62, 90th Cong. 1st Sess., Apr. 10, 1967.

Standing of Members to Sue in Representative Capacity

§ 1.7 The Members of Congress have standing to sue in their representative capacity where the suit would enable them to inquire into certain actions in the discharge of their constitutional duties regarding legislation.

On May 25, 1971, Mr. Parren J. Mitchell, of Maryland, was recognized, under a previous order of the House, to address the House for 20 minutes.[17] Mr. Mitchell informed the House that he and 12 other Members of the House had filed on Apr. 7, 1971, a suit in a U.S. District Court asserting that the war in Indochina was illegal because it lacked a decision by Congress to fight such war.

Mr. Mitchell then inserted in the Record copies of the complaint and all briefs filed in that action. The complaint indicated that Mr. Mitchell and the other Members were filing suit in their official capacity as Representatives in Congress.

In *Mitchell* v *Laird,* the court, in upholding the standing of the Members of the House to bring the suit in their representative capacity, said:

> However, plaintiffs are not limited by their own concepts of their standing to sue. We perceive that in respects which they have not alleged they may be entitled to complain. If we, for the moment, assume that defendants' actions in continuing the hostilities in Indo-China were or are beyond the authority conferred upon them by the Constitution, a declaration to that effect would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities, such as raising an army or enacting other civil or criminal legislation. In our view, these considerations are sufficient to give plaintiffs a standing to make their complaint. Cf. *Flast* v *Cohen,* 392 U.S. 83 (1968); *Association of Data Processing Service Organizations, Inc.* v *Camp,* 397 U.S. 150 (1970); *Barlow* v *Collins,* 397 U.S. 159 (1970).[18]

On Jan. 26, 1970,[19] Mr. Jerry L. Pettis, of California, addressed the House in relation to a brief which he and 31 other Members had filed in the Federal Appellate Court in the District of Columbia

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17. 117 CONG. REC. 16846, 92d Cong. 1st Sess.

18. See *Mitchell* v *Laird,* 488 F2d 611 (D.C. Cir. 1973).

For other decisions relating to standing to file suit in an official capacity, see *Reed et al.* v *The County Commissioners,* 277 U.S. 376 (1928); *Coleman* v *Miller,* 407 U.S. 433 (1939).

19. 116 CONG. REC. 1089, 1090, 91st Cong. 21 Sess.

in a case brought against the Civil Aeronautics Board. Mr. Pettis and the other Members had asked the court to reverse the decision of the board that had recently allowed all domestic interstate airlines to put fare increases into effect. The brief and memoranda filed by those Members, inserted in the Record,[20] stated that "petitioners are proceeding in their capacities as users of the airways and Representatives of their respective constituencies and of other members of the public who travel by air." [1]

On June 23, 1971, there was inserted in the Record by Mr. Robert C. Eckhardt, of Texas, a brief in support of a motion for intervention in an action in the United States District Court for the District of Columbia.[2] The case involved the application by the U.S. government for an injunction against the publication by the Washington Post of a Defense Department test study on the Vietnam conflict.[3] The brief stated that the Members of Congress had standing to sue as intervenors because of their "interest in not being deprived of information which would normally flow to them but for an intervening act of government restraining that flow."

On June 28, 1971, Mr. Eckhardt inserted in the *Congressional Record* a second brief on the same case, filed on behalf of 27 Members of Congress in opposition to the injunction.[4] The brief described the interest of the Members of Congress in the suit as follows:

> The Members of Congress, on whose behalf this brief is filed, have a vital interest in the outcome of these cases, distinct from that of the plaintiff, the defendants, or the general public. As members of the national legislature they must have information of the kind involved in these suits in order to carry out their law-making and other functions in the legislative branch of the government. They seek to vindicate here a legislative right to know.
>
> In addition as elected representatives of the people in their districts, Members of Congress have a particular and profound interest in having their constituents obtain all the information necessary to perform their functions as voters and citizens. More than any other officials of government, Members

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20. *Id.* at pp. 1089 et seq.

1. *Id.* at p. 1090.

2. 117 CONG. REC. 21750–54, 92d Cong. 1st Sess.

3. Civil Action No. 1235–71, U.S. District Court for the District of Columbia. The controversy was resolved by the Supreme Court in *N.Y. Times Co.* v *U.S.*, 403 U.S. 713 (1971), where the court ruled the federal government could not restrain publication of the information.

4. Mr. Eckhardt's introduction of the brief appears at 117 CONG. REC. 22561, 92(Cong. 1st Sess.

of Congress have relations with the public that gives them a crucial concern with the public's right to know.(5)

§ 1.8 In the 92d Congress, a Senator instituted an action in a federal district court to challenge the constitutionality of a pocket veto by the President, and was held to have standing to bring such suit in his representative capacity.

On Aug. 9, 1972, Senator Edward M. Kennedy, of Massachusetts, addressed the Senate in relation to his efforts to seek a judicial determination of the legal and constitutional issues surrounding the President's pocket veto power. He contended that the action of the President in withholding his approval of the Family Practice of Medicine Act (S. 3418) did not result in a pocket veto because it took effect while the Congress was on a brief holiday recess, and not adjourned *sine die* after a Congress or after a session.(6)

By unanimous consent, Senator Kennedy inserted in the *Congressional Record* a statement of his contentions, his complaint before the District Court for the District of Columbia, and other materials relating to the vetoed bill.(7) In the case to which Senator Kennedy referred,(8) the United States Court of Appeals for the District of Columbia Circuit held, in reliance upon *Sierra Club* v *Morton,* 405 U.S. 727 (1972), *Flast* v *Cohen,* 392 U.S. 83 (1968), *Association of Data Processing Organizations, Inc.* v *Camp,* 397 U.S. 150 (1970), *Coleman* v *Miller,* 307 U.S. 433 (1939), and *Baker* v *Carr,* 369 U.S. 186 (1962), that the appellee, a United States Senator, had standing to maintain a suit, in his capacity as an individual Senator who voted in favor of a bill, to challenge the effectiveness of a Presidential "pocket veto" during an intra-session recess of Congress.

On the issue of standing, the court concluded that "appellee's object in this lawsuit is to vindicate the effectiveness of his vote. No more essential interest could be asserted by a legislator. We are satisfied, therefore, that the purposes of the standing doctrine are fully served in this litigation."

The court then held, on the issue whether the bill allegedly pocket-vetoed became a law, that it did become a law, an intra-ses-

5. *Id.* at . 22562.

6. 118 CONG. REC. 27457, 92d Cong. 2d Sess.

7. 118 CONG. REC. 27457–61, 92d Cong. 2d Sess.

8. See *Kennedy* v *Sampson,* ____F2d____ (D.C. Cir., Aug. 14, 1974).

sion adjournment not preventing the return of a vetoed bill to Congress where appropriate arrangements had been made for receipt of Presidential messages during the adjournment. (The Secretary of the Senate had been authorized by unanimous consent to receive messages from the President during the adjournment to a day certain.)[9]

§ 1.9 The Senate adopted a resolution authorizing payment from its contingent fund of expenses incurred by a Senator as a party in litigation involving the Speech and Debate Clause of the United States Constitution, and providing for the appointment of a select committee to appear as amicus curiae before the United States Supreme Court and to file a brief on behalf of the Senate in the action.

On Mar. 23, 1972,[10] the Senate discussed its possible intervention in the case of *Gravel* v *United States,* involving the Speech and Debate Clause of the Constitution then pending in the Supreme Court of the United States, Senator Maurice R. Gravel, of Alaska, being a party thereto. The Senate adopted a resolution (S. Res. 280) authorizing the President pro tempore, Allen J. Ellender, of Louisiana, to appoint Members of the Senate to a committee to seek permission to appear as amicus curiae in the case:[11]

RESOLUTION

Authorizing Senate intervention in the Supreme Court proceedings on the issue of the scope of article I, section 6, the so-called speech and debate clause of the Constitution

Whereas the Supreme Court of the United States on Tuesday, February 22, 1972, issued writs of certiorari in the case of Gravel against United States; and

Whereas this case involves the activities of the junior Senator from Alaska, Mr. Gravel; and

Whereas in deciding this case the Supreme Court will consider the scope and meaning of the protection provided to Members of Congress by article I, section 6, of the United States Constitution, commonly referred to as the "Speech or Debate" clause, including the application of this provision to Senators, their aides, assistants, and associates, and the types of activity protected; and

Whereas this case necessarily involves the right of the Senate to govern its own internal affairs and to deter-

9. 116 CONG. REC. 43221, 91st Cong. 2d Sess., Dec. 22, 1970. See also Ch. 24, infra, for discussion of the veto power generally.

10. 118 CONG. REC. 9902, 9907, 9915, 9920, 9921, 92d Cong. 2d Sess.

11. *Gravel* v *United States,* 408 U.S. 606 (1972).

mine the relevancy and propriety of activity and the scope of a Senator's duties under the rules of the Senate and the Constitution; and

Whereas this case therefore concerns the constitutional separation of powers between legislative branch and executive and judicial branches of Government; and

Whereas a decision in this case may impair the constitutional independence and prerogatives of every individual Senator, and of the Senate as a whole; and

Whereas the United States Senate has a responsibility to insure that its interests are properly and completely represented before the Supreme Court: Now, therefore, be it

Resolved, That the President pro tempore of the Senate is hereby authorized to appoint a bipartisan committee of Senators to seek permission to appear as amicus curiae before the Supreme Court and to file a brief on behalf of the United States Senate; and be it further

Resolved, That the members of this bipartisan committee shall be charged with the responsibility to establish limited legal fees for services rendered by outside counsel to the committee, to be paid by the Senate pursuant to these resolutions; be it further

Resolved, That any expenses incurred by the Committee pursuant to these resolutions including the expense incurred by the Junior Senator from Alaska as a party in the above mentioned litigation in printing records and briefs for the Supreme Court shall be paid from the contingent fund of the Senate on vouchers authorized and signed by the President pro tempore of the Senate and approved by the Committee on Rules and Administration; be it further

Resolved, That these resolutions do not express any judgment of the action that precipitated these proceedings; and be it further

Resolved, That the Secretary of the Senate transmit a copy of these resolutions to the Supreme Court.

MR. [MICHAEL J.] MANSFIELD [of Montana]: Mr. President, there are some recommendations relative to the counsel to be appointed from the Democratic side and three associate counsel to assist the chief counsel. Would the Chair make those nominations at this time on behalf of the majority?

THE PRESIDENT PRO TEMPORE: Under the resolution just agreed to, the Chair appoints the Senator from North Carolina (Mr. Ervin) chief counsel, and the Senator from Mississippi (Mr. Eastland), the Senator from Rhode Island (Mr. Pastore), and the Senator from Georgia (Mr. Talmadge) as associate counsel.

THE PRESIDING OFFICER (Mr. Stafford) subsequently stated: The Chair, on behalf of the President pro tempore, under Senate Resolution 280, makes the following appointments to the committee established by that resolution: The Senator from New Hampshire (Mr. Cotton), the Senator from Colorado (Mr. Dominick), the Senator from Maryland (Mr. Mathias), and the Senator from Ohio (Mr. Saxbe).

§ 2. Seniority and Derivative Rights

Seniority is a Member's length of service in the House or on a

House committee. The seniority system is the traditional practice[12] in the House whereby certain prerogatives and positions are made available to those Members with the longest continuous service in the House or on committee.[13] However, the seniority system as such is nowhere codified and is only mentioned collaterally in the House rules;[14] it can be changed by the House or modified by the party caucuses.[15]

There are two types of seniority—congressional seniority, which relates to the length of service in the House, and committee seniority, which relates to the length of consecutive service on a particular committee.

12. For detailed descriptions of the practice and its origins, see Celler, The Seniority Rule in Congress, Western Poll Quar. (Mar. 1961); Goodwin, The Seniority System in Congress, Am. Poll Sci. Rev. (June 1959); Polsby, Gallaher, and Rundquist, The Growth of the Seniority System in the U.S. House of Representatives, Am. Poll Sci. Rev. (Sept. 1969).

Congressional hearings have focused on the seniority system and proposals for change. Hearings of the Joint Committee on the Organization of Congress, 79th Cong. 1st Sess. (1945); hearings of the Joint Committee on the Organization of Congress, 89th Cong. 1st Sess. (1965); hearings of the Special Subcommittee on Legislative Reorganization of the House Committee on Rules, 91st Cong. 1st Sess. (1970). For a critical analysis of the system by an ex-Member, see 116 CONG. REC. 26034–39. 91st Cong. 2d Sess., July 28, 1970.

13. In assigning office suites, "longest continuous service" refers not only to present consecutive service but also to a past period of service interrupted by a period of nonmembership. (See § 2.1, infra).

In computing committee seniority, the Committee on Committees may credit a Member for past interrupted service on the committee to which he has been assigned (see § 2.2, infra).

14. Rule X clause 4, *House Rules and Manual* § 672 (1973) provides for the Member next in rank on a standing committee to act as chairman in the latter's absence.

The House rejected proposed amendments to the Legislative Reorganization Act of 1970 which would have altered and codified seniority as a factor in the selection of committee chairmen (see § 2.4, infra).

15. For demotions in seniority by the House, see §§ 2.11, 2.12, infra. For seniority demotions by the party, see §§ 2.13–2.16, infra.

For changes implemented by the majority and minority party caucuses in the 92d and subsequent Congresses modifying strict seniority practices in the selection of committee chairmen, see Ch. 3, supra, and Ch. 17, infra.

One party has refused to interfere with the prerogative of the opposing party caucus in selecting a committee chairman on the basis of seniority. 117 CONG. REC. 1709–13, 92d Cong. 1st Sess., Feb. 4, 1971.

Congressional seniority is computed from the official date that a Member begins his service. Therefore, seniority ordinarily dates from Jan. 3 of the first Congress to which a Member is elected or re-elected after a break in service in the House.[16] Where a Member is elected to fill a vacancy, his congressional seniority is computed from the date of election.[17] An objection to a Member's right to be sworn, later resolved in his favor, does not affect his congressional seniority.[18]

Committee seniority is computed from the date a Member is elected to a specific committee. Members-elect whose seats in the House are in doubt may be excluded from the resolution electing committees and fixing rank thereon, pending resolution of any challenges and investigations.[19]

Some of the rights derived from congressional seniority are purely ceremonial in nature. For example, a senior Member traditionally announces the death of a Member from his state and party.[20] Where a delegation of Members is appointed by the Speaker for the funeral of an ex-Member, Members are listed in the order of their congressional seniority.[1] The dean of the House, or the Member with the longest continuous service in the House, traditionally administers the oath to the Speaker at the beginning of a new Congress.[2]

Congressional seniority determines the priority of assignment to office suites in the office buildings.[3]

Committee rank and the election of committee chairmen and subcommittee chairmen is largely a matter for determination by the political party organizations in the House.[4] In computing committee

16. Pursuant to the 25th amendment to the Constitution (ratified Feb. 6, 1933), the terms of Members begin on Jan. 3 of the odd-numbered years.

17. Cf. 2 USC § 37 (salary begins at election for Member to fill unexpired term) and 2 Hinds' Precedents § 1206 (general discussion of terms of Members elected to fill vacancies).

18. See Ch. 2, supra (rights of Members-elect).

19. See §§ 2.5, infra (election to committee after resolution of contest), and 2.11, infra (Member-elect excluded pending investigation, elected to no committees, and stripped of chairmanship).

20. See § 2.21, infra.

1. See § 2.22, infra.

2. See § 2.20, infra.

3. Preference is given to those Members with longest continuous service in the House. *House Rules and Manual* § 985 (1973).

For computation of "longest continuous service" as related to the assignment of offices, see § 2.1, infra.

4. For party organization, see Ch. 3, supra. For committee election and organization, see Ch. 17, infra.

seniority, a party organization may credit not only the present consecutive service of a committee member, but also prior interrupted service on the same committee.(5)

Relative committee rank is indicated by the order in which the names of Members appear in the resolution which names Members to a standing committee.(6) When the committee seniority of a Member is not yet determined, or if election contests over his seat are pending, vacancies may be left open in the resolution pending the determination of such matters.(7)

A Member may be stripped of his congressional seniority or his committee seniority for certain improprieties.(8) Thus, in the 91st Congress, the House punished a Member for improper conduct in past Congresses by reducing his seniority to that of a first-term Representative.(9)

Forms

Form of resolution electing a Member to committee and fixing his rank thereon.

Resolved, That J. Edward Roush, of Indiana, be, and is hereby elected a Member of the standing committee of the House of Representatives on Science and Astronautics and to rank No. 10 thereon.(10)

Cross References

Seniority and party organization, see Ch. 3, supra.

Committee organization and seniority, see Ch. 17, infra.

Conference appointments and seniority, see Ch. 33 infra.

Collateral References

Celler, The Seniority Rule in Congress, Western Political Quarterly (Mar. 1961).

When an attempt was made by certain members of the majority party to unseat a committee chairman in the 92d Congress, they urged support from the minority party on the floor of the House, in departing from "the custom of the House, which is that the majority party in the enclaves of their caucus make the determinations and the minority party accepts those decisions." 117 CONG. REC. 1709, 92d Cong. 1st Sess., Feb. 4, 1971 (address of Mr. Jerome Waldie [Calif.]). The minority party refused to support the attempt. *Id.* at p. 1713. During debate on Mr. Waldie's proposal, Mr. James O'Hara (Mich.) stated that "each party should be free to make its own decisions without hindrance from the other." *Id.* at p. 1711. Mr. James Fulton (Pa.), of the minority party, stated: "It has been the custom that each party shall select its own people and set the seniority and that they shall select the membership of the various committees and their own officers and that the other party would do the same." *Id.* at p. 1709.

5. See § 2.2, infra.

6. See § 2.3, infra.

7. See § 2.7, infra.

8. See Ch. 12, infra.

9. See § 2.12, infra.

10. 107 CONG. REC. 10391, 87th Cong. 1st Sess., June 14, 1961.

Goodwin, The Seniority System in Congress, American Political Science Review (June 1959).

Hearings of the Joint Committee on the Organization of Congress, 79th Cong. 1st Sess. (Wash. 1945); Hearings of the Joint Committee on the Organization of Congress, 89th Cong. 1st Sess. (Wash. 1965); Hearings of the Special Subcommittee on Legislative Reorganization of the House Committee on Rules, 91st Cong. 1st Sess. (Wash. 1970).

Polsby, The Growth of the Seniority System in the United States House of Representatives, American Political Science Review (Sept. 1969).

Bolling, *Power in the House,* E.P. Dutton & Co., Inc. (N.Y. 1968).

Democratic Study Group, The Seniority System in the United States House of Representatives, Special Report (Feb. 25, 1970).

Computing Seniority

§ 2.1 In computing seniority for the assignment of office suites, "longest continuous service" is interpreted as the longest period of uninterrupted service as a Member.

On Mar. 2, 1967,[11] the Chairman of the House Office Building Commission, Speaker John W. McCormack, of Massachusetts, announced a determination as to the meaning of the term "longest continuous service" in relation to seniority for assignment of office suites.

MR. MCCORMACK: Mr. Speaker, for the information of the Members, I include an action recently taken by the House Office Building Commission:

ASSIGNMENT OF ROOMS, HOUSE OFFICE BUILDINGS

In connection with assignment of rooms to Members of the House of Representatives in the House Office Buildings, 40 U.S.C. 178 provides, in part, as follows:

"If two or more requests are made for the same vacant room, preference shall be given to the Representative making the request who has been longest in continuous service as a Member and Member-elect of the House of Representatives."

The question was raised before the House Office Building Commission as to whether the wording "longest continuous service" should refer to any period of continuous service whether or not such continuous service occurred before or after a break in service in the House.

At meeting of February 27, 1967, the House Office Building Commission unanimously ruled on this point, as follows:

"The term 'longest continuous service' as used in 40 U.S.C. 178, governing seniority in assignment of rooms in the House Office Buildings, is held to refer to the longest period of uninterrupted service as a Member and Member-elect of the House of Representatives (not necessarily the last period of uninterrupted service as held

11. 113 CONG. REC. 5218, 90th Cong. 1st Sess.

in Cannon's Precedents, Vol. 8, page 981, Sec. 3651)."

This ruling is effective February 27, 1967 and is being submitted as a matter of record for the information of all Members of the House of Representatives.

§ 2.2 In computing committee seniority, a party may credit a Member for prior interrupted service in the House.

In the 89th Congress, Mr. Glenn R. Davis, of Wisconsin, was elected to the Committee on Appropriations, to rank fifth from the bottom.(12) Mr. Davis began service in the 89th Congress after a break in service extending from the 85th Congress to the 88th Congress; prior to that break he had served in the House from the 80th Congress through the 84th Congress.(13)

Mr. Davis was elected to higher committee rank in the 89th Congress than four Members each of whom had served for at least one term immediately preceding the 89th Congress.(14)

12. 111 CONG. REC. 991, 89th Cong. 1st Sess., Jan. 21, 1965.

13. *Biographical Directory of the American Congress 1774–1971*, S. DOC. NO. 92–8, 92d Cong. 1st Sess. (1971).

14. 111 CONG. REC. 991, 89th Cong. 1st Sess., Jan. 21, 1965. For the prior service of those Members listed below Mr. Davis, see the *Biographical Directory of the American Congress 1774–1971*, S. DOC. NO. 92–8, 92d Cong. 1st Sess. (1971).

§ 2.3 Committee rank is indicated by the order in which the names of Members appear in the resolution electing them to a standing committee.

On Feb. 3, 1969,(15) the House made a correction in the election of Members to the standing Committee on Veterans' Affairs, since the original resolution which was adopted contained an error in the order in which names were listed:

MR. GERALD R. FORD [of Michigan]: Mr. Speaker, I ask unanimous consent to vacate the proceedings whereby the House agreed to House Resolution 176 on January 29, and ask for its immediate consideration with an amendment which I send to the desk.

THE SPEAKER:(16) Is there objection to the request of the gentleman from Michigan?

There was no objection.

The Clerk read the resolution, as follows:

H. RES. 176

Resolved, That the following named Members be, and they are hereby, elected members of the following standing committees of the House of Representatives: . . .

COMMITTEE ON VETERANS' AFFAIRS

Charles M. Teague, California; E. Ross Adair, Indiana; William H.

15. 115 CONG. REC. 2433, 2434, 91st Cong. 1st Sess.

16. John W. McCormack (Mass.).

Ayres, Ohio; John P. Saylor, Pennsylvania; Seymour Halpern, New York; John J. Duncan, Tennessee; John Paul Hammerschmidt, Arkansas; William L. Scott, Virginia; Margaret M. Heckler, Massachusetts; John M. Zwach, Minnesota; Robert V. Denney, Nebraska. . . .

AMENDMENT OFFERED BY MR. GERALD R. FORD

The Clerk read as follows:

Amendment offered by Mr. Gerald R. Ford: On page 7, lines 5 and 6, strike out "E. Ross Adair, Indiana; William H. Ayres, Ohio;" and insert: "William H. Ayres, Ohio; E. Ross Adair, Indiana;"

MR. GERALD R. FORD: Mr. Speaker, my amendment, which has just been read by the Clerk, will correct the seniority standing of the gentleman from Ohio (Mr. Ayres) on the Committee on Veterans' Affairs.

The amendment was agreed to.

Seniority Considerations in Selecting Chairmen

§ 2.4 During consideration of a legislative reorganization act, the House rejected two amendments proposing that seniority need not be the sole consideration in the selection of committee chairmen.

On July 28, 1970, during consideration of the Legislative Reorganization Act of 1970,[17] the House rejected an amendment and a substitute amendment proposing that the House consider other factors in addition to seniority in the selection of committee chairmen.

The primary amendment had been offered by Mr. Henry S. Reuss, of Wisconsin, on July 27, 1970.[18] His amendment read as follows:

Sec. 119 Clause 3 of rule X of the rules of the House of Representatives is amended to read as follows:

3. At the commencement of each Congress, the House shall elect as chairman of each standing committee one of the Members thereof, who need not be the Member with the longest consecutive service on the Committee; in the temporary absence of the Chairman the Member next in rank in the order named in the election of the committee, and so on, as often as the case shall happen, shall act as chairman; and in case of a permanent vacancy in the chairmanship of any such committee the House shall elect another chairman.

The substitute amendment, offered as a substitute to Mr. Reuss' amendment, was offered by Mr. Frederick Schwengel, of Iowa, and read as follows:[19]

Sec. 120. Clause 3 of Rule X of the Rules of the House of Representatives is amended to read as follows:

3. (a) As soon as possible after the commencement of each Congress, the senior member of the majority party on each standing committee shall call an organization meeting of all

17. 116 CONG. REC. 26044, 91st Cong. 2d Sess.

18. *Id.* at p. 25831.

19. *Id.* at p. 25832.

the members of the committee for the purpose of electing the chairman of the committee and the minority leader for the committee. . . .

(d) The first order of business at any such organization meeting shall be the election of the chairman of the committee. The three most senior members of the committee who are members of the majority party shall be regarded as having been nominated for the office of chairman. Tellers shall be appointed by the temporary chairman, one from among the members of the committee who are members of the majority party and two from among the other members of the committee. Voting shall be confined to members of the majority party, and shall be by secret written ballot.

(e) After the chairman of the committee has been elected and installed, the next order of business shall be the election of a minority leader for the committee, which shall be accomplished in the same manner as in the case of the election of the chairman except that (1) the tellers shall be appointed by the chairman, two from among the members of the committee who are members of the majority party and one from among the other members of the committee, and (2) voting shall be confined to members of the committee who are not members of the majority party. . . .

After these amendments were of I Bred, and before they were rejected by the House, there ensued lengthy debate on the seniority system in the House and on possible alternatives to the current practice.[20]

20. See the *Congressional Record* insert at 116 CONG. REC. 26034–39, 91st Cong. 2d Sess., July 28, 1970, of a paper written by ex-Member John V. Lindsay (N.Y.) on the seniority system in current practice and on proposals for change.

Fixing Committee Seniority

§ 2.5 When the House has determined the right of a Member to his seat after the organization of the House, the House elects such Member to committee and designates his rank thereon by resolution.

On June 29, 1961,[1] pursuant to the determination by the House on June 14, 1961, that Mr. J. Edward Roush, of Indiana, was entitled to a seat,[2] the House adopted the following resolution:

Resolved, That J. Edward Roush, of Indiana, be, and he is hereby elected a Member of the standing committee of the House of Representatives on Science and Astronautics and to rank No. 10 thereon.

§ 2.6 Where a senior Member was assigned to the last position on a committee for disciplinary purposes by his party caucus, the House was advised that junior Members subsequently elected to the committee would be placed below the punished Member in rank.

1. 107 CONG. REC. 11797, 87th Cong. 1st Sess.

2. 107 CONG. REC. 10391, 87th Cong. 1st Sess.

On Oct. 18, 1966,[3] the House was considering a resolution electing a junior Member from New York to the standing Committee on Interstate and Foreign Commerce. Mr. John B. Williams, of Mississippi, who had been assigned the last position on that committee by the Democratic Caucus at the convening of the 89th Congress,[4] arose to propound an inquiry. He asked whether the freshman Member would go above him or below him in committee rank. Mr. Wilbur D. Mills, of Arkansas, who had offered the resolution, responded that freshmen Members newly elected to the same committee would be placed below Mr. Williams.

§ 2.7 The Committee on Committees may report a resolution leaving vacancies on certain standing committees pending further consideration of the assignments and seniority of certain Members.

On Jan. 23, 1967,[5] the Committee on Committees reported House Resolution 165, electing Members to committees but leaving certain vacancies on the Committee on Interstate and Foreign Commerce.

One vacancy related to an as yet undecided contested election case.[6]

The other vacancy related to the undetermined status of Mr. John B. Williams, of Mississippi, who had, in the 89th Congress, been stripped of his committee seniority and assigned to the last majority position on said committee.[7] Mr. Williams had requested the committee to refrain assigning him to any committee pending a determination by his party caucus of his committee seniority in the 90th Congress.[8]

Correction of Seniority Rankings

§ 2.8 The House by unanimous consent fixed the relative rank of two Members on a committee where an error had been made in the original appointment.

On Jan. 20, 1947,[9] the House agreed by unanimous consent to

3. 112 CONG. REC. 27486, 89th Cong. 2d Sess.

4. See § 2.13, infra.

5. 113 CONG. REC. 1086, 90th Cong. 1st Sess.

6. The right to a seat of Member-elect Benjamin B. Blackburn (Ga.) was challenged on Jan. 10, 1967, 113 CONG. REC. 14, 90th Cong. 1st Sess., and had not yet been decided.

7. See § 2.13, infra.

8. See § 2.16, infra.

9. 93 CONG. REC. 481, 80th Cong. 1st Sess.

correct the committee seniority of two members of a committee:

MR. [CHARLES A.] HALLECK [of Indiana]: Mr. Speaker, in determining seniority on the reorganized Public Lands Committee, into which were merged six previous standing committees of the House, we made an error in the determination of seniority between the gentleman from Colorado [Mr. Rockwell] and the gentleman from North Dakota [Mr. Lemke].

In order to correct that error and to bring that assignment of seniority in line with other similar assignments adopted by the Committee on Committees, I ask unanimous consent to correct the list of members of the Committee on Public Lands by placing the gentleman from Colorado [Mr. Rockwell] No. 4 thereon and the gentleman from North Dakota [Mr. Lemke] No. 5 thereon.

THE SPEAKER:[10] Is there objection to the request of the gentleman from Indiana [Mr. Halleck]?

There was no objection.

§ 2.9 On one occasion, the House adopted a resolution electing a Member retroactively to a committee and fixing his rank on such committee accordingly.

On Nov. 2, 1939,[11] the House adopted the following resolution:

Resolved, That E.C. Gathings, of Arkansas, be, and he is hereby, elected a member of the standing committee of the House of Representatives on Claims as of June 2, 1939, and shall take rank accordingly.

Parliamentarian's Note: The House took such action because the Member in question had served on the committee for a period of months under the misapprehension, also held by the committee, that he was a duly-elected member of that committee.

§ 2.10 On motion of the Minority Leader, the House agreed by unanimous consent to vacate past proceedings where by it had agreed to a resolution electing minority members to committees, and then reconsidered the resolution with an amendment changing the order of names in order to correct seniority.

On Feb. 3, 1969,[12] Gerald R. Ford, of Michigan, the Minority Leader of the House, asked unanimous consent to vacate the proceedings whereby the House had agreed to House Resolution 176, electing Members to the Committee on Veterans' Affairs. Mr. Ford offered an amendment changing the order of the names, and therefore the seniority of members, in order to correct the

10. Joseph W. Martin, Jr. (Mass.).

11. 85 CONG. REC. 1283, 76th Cong. 2d Sess.

12. 115 CONG. REC. 2433, 2434, 91st Cong. 1st Sess.

seniority standing of Mr. William H. Ayres, of Ohio. The resolution as amended was agreed to by the House.

Demotions in Committee or Congressional Seniority

§ 2.11 Where a Member-elect was excluded from the House pending a determination of his right to his seat, he was stripped of his chairmanship of the Committee on Education and Labor and not named to any committees.

On Jan. 23, 1967,[13] the Committee on Committees reported a resolution (H. Res. 165) electing Carl D. Perkins, of Kentucky, as Chairman of the Committee on Education and Labor, which position had formerly been held by Member-elect Adam C. Powell, of New York. Mr. Powell's name was not nominated for election to any committee. He had been excluded from House membership pending an investigation of his right to a seat.[14]

§ 2.12 In authorizing a challenged Member-elect to take his seat, the House may discipline him for actions in past Congresses by reducing his congressional seniority to that of a first-term Congressman.

On Jan. 3, 1969, the House authorized Adam C. Powell, Member-elect from New York, whose seat had been challenged,[15] to take the oath of office and to be seated as a Member of the House by House Resolution 2.[16] The resolution provided for deductions from Mr. Powell's salary as punishment for past conduct, and also provided as follows:

> (3) That as further punishment the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 91st Congress.

§ 2.13 Two Members were stripped of their committee seniority in the 89th Congress by their party.

In the 89th Congress, the Democratic Caucus adopted a resolution on Jan. 2, 1965, directing the Committee on Committees to demote in committee rank Mr. John B. Williams, of Mississippi, and Mr. Albert W. Watson, of South Carolina. (Both of those Members had allegedly supported

13. 113 CONG. REC. 1086, 90th Cong. 1st Sess.

14. 113 CONG. REC. 26, 90th Cong. 1st Sess., Jan. 10, 1967.

15. 115 CONG. REC. 15, 91st Cong. 1st Sess.

16. *Id.* at p. 33.

the Presidential nominee of the Republican Party.)[17]

Mr. Williams had ranked second on the Committee on Interstate and Foreign Commerce[18] and fifth on the Committee on the District of Columbia in the 88th Congress.[19] In the 89th Congress, he was demoted in seniority by being elected to the last majority position on both of those committees.[20]

Mr. Watson had ranked last on the Committee on Post Office and Civil Service in the 88th Congress.[1] In the 89th Congress, he was elected to the next-to-last position on the Committee on Interstate and Foreign Commerce.[2] (Mr. Watson later resigned from the House, was re-elected as a Republican, and was elected as a minority member of the Committee on Interstate and Foreign Commerce.)[3]

17. See the remarks in the Senate of Senator Strom Thurmond (S.C.) analyzing the action of the House Democratic Caucus and the activities of Mr. Williams and of Mr. Watson which precipitated that party action. 111 CONG. REC. 758, 759, 89th Cong. 1st Sess., Jan. 15, 1965.

18. 109 CONG. REC. 506, 88th Cong. 1st Sess., Jan. 17, 1963.

19. 109 CONG. REC. 505, 88th Cong. 1st Sess., Jan. 17, 1963.

20. 111 CONG. REC. 809, 810, 89th Cong. 1st Sess., Jan. 18, 1965.

1. 109 CONG. REC. 506, 88th Cong. 1st Sess., Jan. 17, 1963.

2. 111 CONG. REC. 992, 89th Cong. 1st Sess., Jan. 21, 1965.

§ 2.14 A Member who had refused to support the Presidential nominee of his party was reduced in committee seniority by his party in the 91st Congress when his name was placed at the bottom of a list of members of his party elected to one of the standing committees.

On Jan. 29, 1969,[4] the House adopted a resolution electing Members to the standing Committee on Agriculture. The name of Mr. John R. Rarick, of Louisiana, was placed at the bottom of the list, pursuant to the determination of the Democratic Caucus to punish him for refusing to support the Presidential nominee of the Democratic Party. Under the listing of the resolution, he became the lowest ranking majority member of the Committee on Agriculture.

§ 2.15 On one occasion, the Committee on Committees left a vacancy on a standing committee pending further consideration of the com-

3. See § 2.17, infra.

4. 115 CONG. REC. 2083, 91st Cong. 1st Sess.

mittee assignments and seniority of a Member whose party had stripped him of committee seniority in the preceding Congress.

On Jan. 23, 1967,[5] the Committee on Committees reported to the House a resolution leaving a vacancy on the Committee on Interstate and Foreign Commerce because of the undetermined status of Mr. John Bell Williams, of Mississippi, who had, in the previous Congress, been stripped of his committee seniority and assigned to the last majority position on said committee.[6]

§ 2.16 In one instance a Member requested the Committee on Committees to refrain from assigning him to any House committees pending a determination by his party caucus of his committee seniority.

On Jan. 23, 1967,[7] there was included in the Record a letter from Mr. John Bell Williams, of Mississippi, to the Chairman of the Democratic Committee on Committees, requesting such committee to postpone assigning him to any House committees pending a determination by the Democratic Caucus of his seniority status.

Parliamentarian's Note: Mr. Williams had been stripped of his committee seniority during the 89th Congress and as of Jan. 23, 1967, his committee seniority in the 90th Congress had not yet been acted upon by the Democratic Caucus.

Effect of Change in Party Affiliation

§ 2.17 A Member who was stripped of committee seniority by his party caucus resigned from Congress, joined the opposition party, was reelected to Congress, and was elected to the same committee.

On Jan. 21, 1965,[8] Mr. Albert W. Watson, of South Carolina, was elected to the next-to-last position in rank on the Committee on Interstate and Foreign Commerce. Mr. Watson had been demoted in committee seniority by the House Democratic Caucus because of his support of the Republican Presidential candidate.[9]

5. 113 CONG. REC. 1086, 90th Cong. 1st Sess.

6. See § 2. 13, Supra.

7. 113 CONG. REC. 1087, 90th Cong. 1st Sess.

8. 111 CONG. REC. 992, 89th Cong. 1st Sess.

9. See § 2.13, supra.

See also the remarks of Senator Strom Thurmond (S.C.) on Jan. 15,

On Jan. 28, 1965,[10] Mr. Watson resigned his congressional seat, to become effective Feb. 1, 1965.

Mr. Watson joined the Republican Party and was re-elected to the Congress as a Republican; he took the oath of office on June 16, 1965.[11]

On June 23, 1965,[12] Mr. Watson was elected to the Committee on Interstate and Foreign Commerce on the recommendation of the Republican Conference.

§ 2.18 A change in party affiliation by a Senator might necessitate a change in party ratios on certain committees and a loss of seats on some committees for the other party.

On Sept. 17, 1964,[13] Majority Leader Michael J. Mansfield, of Montana, announced that the change in party affiliation, from the majority party to the minority party, by Senator Strom Thurmond, of South Carolina, might require a change in party membership ratios on certain committees, since ratios on Senate committees reflect the relative membership of the two parties in the Senate as a whole. Senator Mansfield stated that it would appear that the Republicans would be entitled to an additional seat on each of the two committees on which Senator Thurmond had formerly sat and that the Democrats would lose those seats on those committees.

Seniority as Affecting Floor Recognition

§ 2.19 The order of recognition to offer amendments is within the discretion of the Chair, but precedent indicates that he should recognize members of the committee handling the pending bill in the order of their committee seniority.

On July 23, 1970,[14] Chairman Chet Holifield, of California, ruled, in answer to a parliamentary inquiry, that he would recognize members of a committee handling a pending bill to offer amendments in the order of their

1965, 111 CONG. REC. 758, 759, 89th Cong. 1st Sess., explaining the circumstances under which Mr. Watson was stripped of his seniority.

10. 111 CONG. REC. 1452, 89th Cong. 1st Sess.

11. 111 CONG. REC. 13774, 89th Cong. 1st Sess.

12. 111 CONG. REC. 14501, 89th Cong. 1st Sess.

13. 110 CONG. REC. 22369, 88th Cong. 2d Sess.

14. 116 CONG. REC. 25635 91st Cong. 2d Sess.

seniority. He stated that the order in which amendments may be offered to a pending paragraph (open to amendment at any point) is not determined by the sequence of lines to which the amendments may relate, but by the committee rank of those seeking recognition.(15)

Seniority Considerations and Ceremonial Functions

§ 2.20 The Member of the House with longest consecutive service customarily administers the oath to the Speaker at the convening of a new Congress.(16)

At the convening of the 90th Congress the Member with the longest consecutive service in the House, Mr. Emanuel Celler, of New York, administered the oath to the newly-elected Speaker.(17) Mr. Celler likewise administered the oath to the Speaker at the opening of the 91st Congress.(18)

When Mr. Celler was absent on the opening day of the 92d Congress, Wright Patman, of Texas, the Member second to him in consecutive service, administered the oath to the Speaker.(19)

§ 2.21 The announcement of the death of a sitting Member is normally the prerogative of the senior Member of the deceased's state party delegation in the House.

On June 23, 1969,(20) Mr. Silvio O. Conte, of Massachusetts, the

15. For full discussion of priorities of recognition, see Ch. 29, infra.

16. The Member of longest consecutive service is now the "Dean" of the House (113 CONG. REC. 14, 90th Cong. 1st Sess., Jan. 10, 1967; 115 CONG. REC. 15, 91st Cong. 1st Sess., Jan. 3, 1969), although he has sometimes been termed the "Father" of the House (2 Hinds' Precedents § 1140; 6 Cannon's Precedents § 6).

While the Member with longest consecutive service has usually administered the oath to the Speaker in past Congresses, the practice has not always been followed (6 Cannon's Precedents § 6).

17. 113 CONG. REC. 14, 90th Cong. 1st Sess., Jan. 10, 1967. As of the convening of the 92d Congress, Mr. Celler had amassed service in 24 consecutive Congresses. *Biographical Directory of the American Congress 1774–1971,* S. DOC. NO. 92–8, 92d Cong. 1st Sess. (1971).

18. 115 CONG. REC. 15, 91st Cong. 1st Sess., Jan. 3, 1969.

19. 117 CONG. REC. 13, 92d Cong. 1st Sess., Jan. 21, 1971. As of the beginning of the 92d Congress, Mr. Patman had served for 21 consecutive Congresses. *Biographical Directory of the American Congress 1774–1971,* S. DOC. NO. 92–8, 92d Cong. 1st Sess. (1971).

20. 115 CONG. REC. 16795, 91st Cong. 1st Sess.

senior member of the Republican party state delegation from Massachusetts, arose to announce to the House the death of Mr. William H. Bates, a Republican from Massachusetts.

Similarly, the death of Senate Minority Leader, Everett M. Dirksen, of Illinois. was announced to the House by the senior member of his party in his state's House delegation, Mr. Leslie C. Arends, of Illinois, on Sept. 8, 1969.(1)

§ 2.22 When the Speaker appoints a funeral delegation for a deceased Member, he lists, following the state delegation, other appointed Members in the order of their seniority.

On June 23, 1969,(2) Speaker John W. McCormack, of Massachusetts, announced his appointments to the funeral delegation for the funeral of a deceased Member of the House. After listing the names of the Members from the same state as the deceased Member, the Speaker listed the names of 45 other Members of the House, listed in order of their congressional seniority.(3)

1. 115 CONG. REC. 24634, 91st Cong. 1st Sess.
2. 115 CONG. REC. 16800, 16801, 91st Cong. 1st Sess.
3. For other instances where House funeral delegations were listed in order of congressional seniority, see 115 CONG. REC. 24695, 91st Cong. 1st Sess., Sept. 8, 1969; 116 CONG. REC. 25866, 91st Cong. 2d Sess., July 27, 1970; 116 CONG. REC. 43770, 91st Cong. 2d Sess., Dec. 29, 1970.

Senate Practice

§ 2.23 In the Senate, prerogative according to seniority practice is a custom, not a rule, and is not always followed.

On Mar. 2, 1956,(4) Senator Wayne L. Morse, of Oregon, in opposing the appointment of a senior Senator to the chairmanship of the Senate Judiciary Committee, stated that the seniority practice in the Senate is a customary tradition but is not a rule. Senator Morse listed three important precedents in the Senate where the Senate did not elevate to the chairmanship of a committee the next Senator in line in order of seniority.(5)

4. 102 CONG. REC. 3815, 84th Cong. 2d Sess.
5. The precedents cited by Senator Morse occurred during the 42d Congress, where Senator Charles Sumner (Mass.) was dropped as Chairman of the Committee on Foreign Relations, during the 68th Congress where Senator Albert B. Cummins (Iowa) was dropped as Chairman of the Committee on Interstate Commerce and during the 69th Congress,

§ 2.24 The Senate may, by unanimous consent, exchange the committee seniority of two Senators pursuant to a request by one of them.

On Feb. 23, 1955,[6] Senator Styles Bridges, of New Hampshire, asked and obtained unanimous consent that his position as ranking minority member of the Senate Armed Services Committee be exchanged for that of Senator Everett Saltonstall, of Massachusetts, the next ranking minority member of that committee, for the duration of the 84th Congress, with the understanding that that arrangement was temporary in nature, and that at the expiration of the 84th Congress he would resume his seniority rights.[7]

In the succeeding Congress, on Jan. 22, 1957,[8] Senator Bridges reiterated that request for the duration of the 85th Congress.

It was so ordered by the Senate.

§ 3. Status of Delegates and Resident Commissioner

Delegates and Resident Commissioners are those statutory officers who represent in the House the constituencies of territories and properties owned by the United States but not admitted to statehood.[9] Although the persons holding those offices have many of

when Senator Edwin F. Ladd (N.D.) was not designated to the chairmanship of the Committee on Public Lands and Surveys, to which he had seniority under the traditional practice.

6. 101 CONG. REC. 1930, 1931, 84th Cong. 1st Sess.

7. Mr. Bridges stated he requested the alteration of seniority "because last year he [Senator Saltonstall] served as Chairman of the Armed Services Committee, and did a very able job in that capacity; and I desire to show him the courtesy of letting him be a rung higher on the ladder, so to speak, temporarily. . . ." *Id.* at p. 1931.

8. 103 CONG. REC. 835, 85th Cong. 1st Sess.

9. For general discussion of the status of Delegates, see 1 Hinds' Precedents §§ 400, 421, 473; 6 Cannon's Precedents §§ 240, 243.

In early Congresses, Delegates were construed only as business agents of chattels belonging to the United States, without policymaking power (1 Hinds' Precedents § 473), and the statutes providing for Delegates called for them to be elected to "serve" (i.e., act of July 13, 1787, 1 Stat. 52, § 12), not to "represent", which is the language in later statutes (48 USC § 1711 [Guam and Virgin Islands]; Pub. L. No. 91–405, 84 Stat. 852, § 202(a), Sept. 22, 1970 [District of Columbia]). The provision relating to the Resident Commissioner from Puerto Rico, 48 USC § 891, does not define his function and does not explicitly provide for his participation in the House of Representatives.

the attributes of House membership, they are not actual Members of the House, since the Constitution provides only for Members or representatives of states duly admitted into the Union. The Constitution is silent on representation of territories and other properties belonging to the United States, although article IV, section 3, clause 2, grants exclusive sovereignty to the United States over such lands.(10)

The offices of Delegate and Resident Commissioner are created, defined, and limited by statute.(11) The first such statute was adopted on July 13, 1787, authorizing the election of a Delegate to Congress from the territory northwest of the Ohio River.(12) The act allowed that Delegate to have a seat in Congress, with the right of debating, but not of voting, on the floor of the House.(13) The statute creating the office of Resident Commissioner did not provide for a seat in the House.(14) In succeeding Congresses, the Resident Commissioner was given debating and floor rights,(15) and now holds the same powers and privileges in committees as other Members.(16)

Although the issue has been discussed, Congress has never provided for a Delegate or Resident Commissioner to represent his constituency in the Senate.(17)

There is a long list of statutes dating from 1787 providing for Delegates to Congress from various regions and territories.(18)

10. As to jurisdiction over the District of Columbia, U.S. Const. art. I, § 8, clause 17, grants exclusive legislation over the seat of government to the Congress.

11. See 1 Hinds' Precedents §§ 400, 421, 473.

A territory or district must be organized by law before the House will admit a representative Delegate (1 Hinds' Precedents §§ 405, 407, 411, 412).

12. 1 Stat. 52, § 12.

13. In the early history of Congress, Delegates were allowed to vote on committees to which assigned (1 Hinds' Precedents § 1300). They lost the right in the latter half of the 1800's (1 Hinds' Precedents § 1301) but have regained the right under current House rules. (See § 3.10, infra.)

14. Act of Apr. 12, 1900, 31 Stat. 86, Ch. 191 (Puerto Rico), now codified as 48 USC § 891

15. 2 Cannon's Precedents §§ 244–246.

16. Rule XII clause 1, *House Rules and Manual* § 740 and note thereto, § 741 (1973).

17. See 1 Hinds' Precedents § 400. For a recent attempt to provide for nonvoting Delegates in the Senate, see amendment offered to H.R. 8787 (bill to create Delegate positions for Guam and the Virgin Islands) at 118 CONG. REC. 24, 92d Cong. 2d Sess., Jan. 18, 1972.

18. Delegates have been authorized by the following laws: Act of July 13, 1787, 1 Stat. 52 (Northwest terri-

tory); Act of May 26, 1790, 1 Stat. 123, Ch. 14 (territory south of Ohio); Act of Jan. 9, 1808, 2 Stat. 455, § 3 (Mississippi territory); Act of Feb. 27, 1809, 2 Stat. 525, Ch. 19 (Indiana territory); Act of June 4, 1812, 2 Stat. 745, § 9 (Missouri territory); Act of Mar. 3, 1817, 3 Stat. 363, Ch. 42 (Delegates in all the territories); Act of Mar. 3, 1817, 3 Stat. 373, § 4 (Alabama territory); Act of Feb. 16, 1819, 3 Stat. 482, Ch. 22 (Michigan territory); Act of Mar. 2, 1819, 3 Stat. 495, § 12 (Arkansas territory); Acts of Mar. 30, 1822, 3 Stat. 659, § 14, and Mar. 3, 1823, 3 Stat. 754, § 15 (Florida territory); Act of Apr. 20, 1836, 5 Stat. 15, § 14 (Wisconsin territory); Act of June 12, 1838, 5 Stat. 240, § 14 (Iowa territory); Act of Aug. 14, 1848, 9 Stat. 329, § 16 (Oregon territory); Act of Mar. 3, 1849, 9 Stat. 408, § 14 (Minnesota territory); Act of Sept. 9, 1850, 9 Stat. 451, § 14 (New Mexico territory); Act of Sept. 9, 1850, 9 Stat. 457, § 13 (Utah territory); Act of Mar. 2, 1853, 10 Stat. 178, § 14 (Washington territory); Act of May 30, 1854, 10 Stat. 282, § 14 and 10 Stat. 289, § 32 (Nebraska and Kansas territories); Act of Feb. 28, 1861, 12 Stat. 176, § 13 (Colorado territory); Act of Mar. 2, 1861, 12 Stat. 214, § 13 (Nevada territory); Act of Mar. 2, 1861, 12 Stat. 243, § 13 (Dakota territory); Act of Mar. 3, 1863, 12 Stat. 813, § 13 (Idaho territory); Act of May 26, 1864, 13 Stat. 91, § 13 (Montana territory); Act of July 25, 1868, 15 Stat. 182, § 13 (Wyoming territory); Act of Feb. 21, 1871, 16 Stat. 426, § 34 (District of Columbia—repealed in 1874); Act of May 2, 1890, 26 Stat. 89, § 16 (Oklahoma territory); Act of Apr. 30, 1900, 31 Stat. 158, § 85 (Hawaii); Act of May 7, 1906, 34 Stat. 169–175 (Alaska); Act of Sept. 22, 1970, Pub. L. No. 91–405, 84 Stat. 852 (District of Columbia); Act of Apr. 10, 1972, Pub. L. No. 92–271, 86 Stat. 118 (Guam and Virgin Islands).

Resident Commissioners have been created by the following laws: Act of Apr. 12, 1900, 31 Stat. 86, Ch. 191 (Puerto Rico); Act of Aug. 29, 1916, 39 Stat. 552, Ch. 416 (Philippine Islands).

The granting to a territory of Delegate representation has up to the present preceded the admission of such territory as a state into the Union. On the other hand, those properties of the United States which have been granted representation by a Resident Commissioner have not become states.[19] The question has arisen whether a territory or other property is entitled to a Delegate or to a Resident Commissioner. It has been stated that an incorporated territory, prepared to meet the qualifications for statehood, was entitled to a Delegate in Congress, and that unincorporated property,[20] not generally con-

19. Puerto Rico remains represented by a Resident Commissioner (48 USC § 891). The office of Resident Commissioner from the Philippines was eliminated upon a grant of independence from the United States (see § 3.3, infra).

20. The insular possessions of Puerto Rico, Guam, and the Virgin Islands,

templated for statehood, would be entitled to a Resident Commissioner.(1)

There is no practical distinction between the rights, privileges, and entitlements of the Delegate and the Resident Commissioner.(2) In 1972, Congress granted to Guam and the Virgin Islands, considered unincorporated property of the United States,(3) the right to Delegates. Congress provided in the 91st Congress for a nonvoting Delegate to Congress from the District of Columbia,(4) which was characterized not as a territory or property belonging to the United States, but as the seat of government. The special status of the seat of government is indicated by article I, section 8, clause 17, of the Constitution, granting "exclusive legislation" in the Congress over the seat of government, and by the fact that the ratification of the 23d amendment to the Constitution was necessary in order to grant representation in the electoral college to the District of Columbia.

Since 1936, several offices of Delegate have been created and some eliminated. The Delegates from Alaska and from Hawaii

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have been held to be unincorporated territories (*Smith* v *Government of the Virgin Islands,* 375 F2d 714 [3d Cir. 1967]) to which the basic "fundamental principles" of the Constitution are applicable. *Soto* v *U.S.,* 273 F 628 (3d Cir. 1921); *Government of the Virgin Islands* v *Rijos,* 285 F Supp 126 (D. Virgin Islands 1968).

1. See the remarks of Mr. John C. Spooner (Wisc.), Apr. 2, 1900, 33 CONG. REC. 3632, 56th Cong. 1st Sess., maintaining that Puerto Rico was granted only a Resident Commissioner because of resistance to its becoming a state.

See also the more recent remarks of John L. McMillan (S.C.), Chairman of the District of Columbia Committee, on Aug. 10, 1970, 116 CONG. REC. 28061, 91st Cong. 2d Sess., objecting to the granting of a Delegate to the District of Columbia on the grounds that the grant was without legal precedent, since: 1. Delegates were intended to be interim representatives from territories which were to become states; 2. Representation from lands under the exclusive jurisdiction of the United States and not intended for statehood were granted Resident Commissioners; 3. The District is under the sole jurisdiction of the United States, was never intended to be a state, and should have been granted only a Resident Commissioner.

2. See Rule XII, *House Rules and Manual* § 740 and note thereto, § 741 (1973).

3. See *Smith* v *Government of the Virgin Islands,* 375 F2d 714 (3d Cir. 1967); *Government of the Virgin Islands* v *Rijos,* 285 F Supp 126 (D. Virgin Islands 1968).

4. For creation of the D.C. Delegate position, see § 3.1 infra.

were both eliminated upon the admission of those territories as states into the Union.[5] The office of Resident Commissioner from the Philippines was discontinued upon the granting of independence to the Philippines by the United States.[6] The most recent change in the number of Delegates was occasioned by the adoption of an act creating new offices of the Delegate from Guam and the Delegate from the Virgin Islands.[7]

In early Congresses, there occurred lengthy debate on the qualifications, disqualifications, and privileges of the Delegates and Resident Commissioners.[8] The principle was established that the Delegates and Resident Commissioners should meet the qualifications laid down in the Constitution for Members.[9]

The most recent acts creating offices of Delegates contain within their provisions explicit qualifications similar to those constitutionally defined for Members.[10]

5. See §§ 3.4, 3.5, infra.

6. See § 3.3, infra.

7. See § 3.2, infra.

8. See 1 Hinds' Precedents §§ 400, 421, 423, 469, 470, 473.

It has been held that the Judiciary has no authority to pass on the qualifications of a territorial Delegate. *Sevilla* v *Elizalde*, 112 F2d 29 (D.C. Cir. 1940).

9. 1 Hinds' Precedents §§ 421, 423 (qualifications similar to those of Members, on public policy grounds). Contra, 1 Hinds' Precedents § 473 (Delegate excluded on basis of crime of polygamy, on grounds his office was not a constitutional one, and Congress could provide for qualifications other than those for Members in the Constitution).

No House precedents appear on the extension to Delegates of the immunities from arrest and from being questioned in another place to Delegates. See, however, *Doty* v *Strong*, 1 Pinn. 84 (Wise. 1840), where the territorial Supreme Court held the privilege from arrest applicable to Delegates.

15 Op. Att'y Gen. 281 (1877) declared that a Delegate, like a Member, was affected by the prohibition against holding incompatible offices, but that he could hold such an office until sworn in as a Delegate.

10. See 48 USC § 1711 (Guam and Virgin Islands Delegates), requiring age of at least 25 years at election, minimum of seven years' citizenship at election, and inhabitancy in the territory, and prohibiting simultaneous candidacy for another office. Pub. L. No. 91–405, 84 Stat. 852, § 202(b) (District of Columbia Delegate) requires a candidate to be a qualified elector, at least 25 years of age, and at least a three-year resident, and prohibits the holding of another paid public office.

The qualifications for the Resident Commissioner are United States citizenship, age of at least 25 years, and fluency in the English language 48 USC § 892.

The Delegate from the District of Columbia is entitled to all the privileges granted a Member under article I, section 6, of the Constitution.[11] The Delegates from Guam and the Virgin Islands are entitled to those privileges and immunities which are granted, or may be granted, to the Resident Commissioner from Puerto Rico under House rules.[12]

In early Congresses, Delegates and Resident Commissioners were entitled to vote in the committees to which they were assigned.[13] The practice was then discontinued for a substantial period of time.[14] In the 92d and 93d Congresses, however, Rule XII of the standing rules, relating to Delegates and Resident Commissioners,[15] was amended to extend to Delegates and Resident Commissioners all the powers in committee held by constitutional Members of the House.[16] The changes in the rule provided for the Delegates and Resident Commissioners to be elected to committees rather than assigned (although the D.C. Delegate is permanently assigned to serve on the District of Columbia Committee).[17] The current powers of Delegates and Resident Commissioners include the right to vote in committee and the accrual of committee seniority.[18]

On the floor of the House, Delegates and Resident Commissioners may debate, make motions, and raise points of order.[19] They are entitled to the same salary and some of the allowances of Members.[20] They are subject to

11. Act of Sept. 22, 1970, Pub. L. No. 91–405, 84 Stat. 852, § 202(a).

12. 48 USC § 1715.

13. See 2 Hinds' Precedents § 1301.

14. 2 Hinds' Precedents § 1300; 6 Cannon's Precedents § 243 (committee report denying committee vote to Delegate since he held no legislative power).

15. *House Rules and Manual* § 740 (1973).

16. See §§ 3.9, 3.10, infra.

17. See § 3.10, infra.

18. See § 3.11, infra (announcement of majority party policy extending full voting and seniority rights in committee to the Delegates and Resident Commissioner).

19. For the parliamentary rights of the Delegate and Resident Commissioner, see *House Rules and Manual* § 741 (note to Rule XII) (1973). See also § 3.6 (introducing bills) and § 3.7 (objection to consideration of bill), infra.

20. 48 USC § 1715 (Guam and Virgin Islands); Pub. L. No. 91–405, 84 Stat. 852, § 204(a) (District of Columbia Delegate); 2 USC § 31 (comprehensive provision for Delegates, Resident Commissioner, Senators, and Representatives).

See § 4, infra, for the salaries of Members and Delegates, § 6, infra, for travel allowances, and § 8, infra,

the same code of conduct and may be disciplined by the House.(1) The rights of Delegates-elect are similar to those of Members-elect, and their credentials must be transmitted to the House in the same manner. The main distinction at organization is that although Delegates and Resident Commissioners must submit credentials and must be administered the oath, their names are not included on the (Clerk's roll to establish a quorum or to vote for a Speaker.(2) A further distinction is that the Resident Commissioner is elected for a term of four years by statute,(3) as opposed to the constitutional term of two years applicable to Members and the statutory term of two years applicable to Delegates.(4)

Establishment of Office of Delegate

§ 3.1 Congress created by law in 1970 the office of Delegate from the District of Columbia to the House of Representatives.

On Aug. 10, 1970,(5) the House considered a bill reported from the Committee on the District of Columbia establishing a Study Commission on the District of Columbia Government and providing for a nonvoting Delegate from the District to the House of Representatives. The section relating to the Delegate reads as follows:

> Sec. 202(a) The people of the District of Columbia shall be represented in the House of Representatives by a Delegate, to be known as the "Delegate to the House of Representatives from the District of Columbia", who shall be elected by the voters of the District of Columbia in accordance with the District of Columbia Election Act. The Delegate shall have a seat in the House of Representatives, with the right of debate, but not of voting, shall have all the privileges granted a Representative by section 6 of Article I of the Constitution, and shall be subject to the same restrictions and regulations as are imposed by law or rules on Representatives. The Delegate shall be elected to serve during each Congress.
>
> (b) No individual may hold the office of Delegate to the House of Representatives from the District of Columbia unless on the date of his election—
>
> (1) he is a qualified elector (as that term is defined in section 2(2) of the District of Columbia Election Act) of the District of Columbia;

for personnel, office, and supply allowances.

1. See § 3.8, infra.
2. See Ch. 2, supra.
3. 48 USC § 891.
4. 48 USC § 1712 (Guam and Virgin Islands); Act of Sept. 22, 1970, Pub. L. No. 91–405, 84 Stat. 852, § 202(a) (D.C. Delegate).
5. 116 CONG. REC. 28054, 91st Cong. 2d Sess.

(2) he is at least twenty-five years of age;

(3) he holds no other paid public office; and

(4) he has resided in the District of Columbia continuously since the beginning of the three-year period ending on such date. He shall forfeit his office upon failure to maintain the qualifications required by this subsection.

The House passed the bill on the same day.(6) The Senate passed the bill on Sept. 9, 1970.(7)

§ 3.2 In 1972 the Congress provided for nonvoting Delegates to the House from the unincorporated territories of Guam and the Virgin Islands.

On Apr. 10, 1972, there was signed into law a bill granting nonvoting Delegate representation in the House from both Guam and the Virgin Islands.(8) The bill provided for a term of two years for those Delegates, laid down qualifications, and accorded them all the privileges that were or might be afforded them under the rules of the House.(9)

The Chairman of the committee handling the bill, the Committee on Interior and Insular Affairs, Wayne N. Aspinall, of Colorado, indicated that there was no legislative intent that the bill be considered as a prelude to statehood for either Guam or the Virgin Islands.(10)

Elimination of Office of Delegate or Resident Commissioner

§ 3.3 The office of Resident Commissioner from the Philippine Islands to the House

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6. 116 CONG. REC. 28062, 91st Cong. 2d Sess. See at p. 28061 the remarks on the same day of John L. McMillan (S.C.), Chairman of the Committee on the District of Columbia, maintaining that the District should receive a Resident Commissioner rather than a Delegate.

7. 116 CONG. REC. 31040, 91st Cong. 2d Sess.

The bill became Pub. L. No. 91–405, 84 Stat. 852, when the President approved it on Sept. 22, 1970. See the Presidential message to Congress on Sept. 28, 1970, 116 CONG. REC. 33865, 91st Cong. 2d Sess.

8. Pub. L. No. 92–271, 86 Stat. 118, codified as 48 USC §§ 1711–1715.

The bill (H.R. 8787) passed the House on Jan. 18, 1972, and was reported from the Committee on Interior and Insular Affairs. 118 CONG. REC. 12–29, 92d Cong. 2d Sess.

9. Pub. L. No. 92–271, 86 Stat. 118, §§ 2–5.

A proposal had been made and rejected, for lack of precedent, for Guam and the Virgin Islands to pay the costs of maintaining Delegates in Congress. 118 CONG. REC. 25–28, 92d Cong. 2d Sess., Jan. 18, 1972.

10. 118 CONG. REC. 13–15, 92d Cong. 2d Sess., Jan. 18, 1972. See also the remarks of Mr. Don H. Clausen (Calif.), *id.* at p. 21.

of Representatives was eliminated in 1946 upon the recognition by the United States of the independence of the Philippines.

Between 1916 and 1946, provision was made for the appointment and qualifications of a Resident Commissioner to the House of Representatives from the Philippine Islands.[11] However, on Mar. 24, 1934, Congress provided by law for the recognition of Philippine independence and withdrawal of American sovereignty.[12] That law provided for a Presidential proclamation to effectuate the surrender of all rights of sovereignty of the United States over the Philippines on a date following the expiration of a period of 10 years from the date of the inauguration of the new government under the Philippine (Constitution provided for in the law. The Presidential proclamation declaring Philippine independence was signed on July 4, 1946.[13]

On July 2, 1946,[14] the House granted unanimous consent that Speaker Sam Rayburn, of Texas, send an appropriate message to the President and the people of the Republic of the Philippines extending the congratulations of the House of Representatives on their independence.

§ 3.4 The office of Delegate from Alaska to the House of Representatives was eliminated in 1959 when Alaska was admitted to statehood.

From 1906 to 1959, the United States Code provided for a Delegate from the Territory of Alaska to represent that territory in the House of Representatives.[15] On July 7, 1958, Alaska was declared by law to be a State of the United States of America. The law provided for the President to issue a proclamation to effectuate the admission of Alaska into the Union.[16] His proclamation was issued on Jan. 3, 1959,[17] and the names of Members-elect from the

11. 48 USC § 1091, Aug. 29, 1916, Ch. 416, § 20, 39 Stat. 552; June 5, 1934, Ch. 390, § 4, 48 Stat. 879.

12. 22 USC § 1394, 48 Stat. 463, Ch. 84, § 10.

13. Proclamation No. 2695, set out as notes following 22 USCA § 1394.

14. 92 CONG. REC. 8167, 79th Cong. 2d Sess.

15. 48 USC § 131 (May 7, 1906, Ch. 2083, § 1, 34 Stat. 169). The Delegate's term of office was provided for in 48 USC § 132 and his salary and allowances provided for in 48 USC § 134.

16. Pub. L. No. 85–508, July 7, 1958, 72 Stat. 339, § 8(c).

17. For the text of Pub. L. No. 85–508 and of the President's Proclamation No. 3269 and other materials relating to Alaska statehood, see the notes preceding 48 USCA § 21.

State of Alaska were called for the first time on the Clerk's roll at the convening of the 86th Congress on Jan. 7, 1959.[18]

§ 3.5 The office of Delegate from the Territory of Hawaii to the House of Representatives was eliminated in 1959 when Hawaii was admitted as a State.

From 1900 until 1959, the law provided for a Delegate to the House of Representatives from the Territory of Hawaii.[19] On Mar. 18, 1959, a law was enacted granting statehood to Hawaii and providing for the issuance of a Presidential proclamation to effectuate the admission of Hawaii into the Union.[20] On Aug. 21, 1959, Hawaii was officially admitted into the Union pursuant to the issuance of a Presidential proclamation.[1]

The first Representative from the State of Hawaii appeared to take the oath of office in the 86th Congress on Aug. 24, 1959.[2]

18. 105 CONG. REC. 11, 86th Cong. 1st Sess.

19. 48 USC § 651, Apr. 30, 1900, 31 Stat. 158, Ch. 339, 85.

20. Pub. L. No. 86–3, 73 Stat. 4, § 7(c).

1. Proclamation No. 3309. The proclamation, Pub. L. No. 86–3, and other materials relating to Hawaii's statehood are set out as notes preceding 48 USCA § 491.

2. 105 CONG. REC. 16799, 86th Cong. 1st Sess. A scroll praising former Delegate John A. Byrns (Hawaii) for his role in achieving Hawaii statehood was placed in the Speaker's lobby for the signature of Members. 105 CONG. REC. 11588, 86th Cong. 1st Sess., June 23, 1959. A private bill introduced by Delegate Byrns before the admission of Hawaii as a state was considered and passed by the House after the admission of Hawaii on May 3, 1960. 106 CONG. REC. 9246, 86th Cong. 2d Sess.

3. 99 CONG. REC. 29, 83d Cong. 1st Sess.

4. 115 CONG. REC. 28801, 91st Cong. 1st Sess.

Floor Privileges; Introducing or Objecting to Bills

§ 3.6 The House granted unanimous consent that a Delegate be permitted to introduce bills notwithstanding his absence from the House.

On Jan. 3, 1953,[3] the House granted unanimous consent to a request that the Delegate from Hawaii, Joseph R. Farrington, unavoidably absent due to a family death, be permitted to introduce bills despite his absence.

§ 3.7 The Resident Commissioner objected to the consideration of a private bill, thereby causing its recommittal.

On Oct. 7, 1969,[4] Speaker John W. McCormack, of Massachusetts, ordered a private bill recommitted

to the Committee on the Judiciary after recognizing Mr. Harold R. Gross, of Iowa, and Jorge L. Cordova, Resident Commissioner, Puerto Rico, for objections to the bill's consideration.

§ 3.8 In the 92d Congress, all Delegates were admitted to the floor, extended the services of the Clerk and Sergeant at Arms, and brought under the Code of Conduct by amendments to the House rules.

On Jan. 21, 1971, the opening day of the 92d Congress,[5] there was offered by William M. Colmer, of Mississippi, Chairman of the Committee on Rules, House Resolution 5, to amend the House rules to reflect the creation of the office of Delegate from the District of Columbia. One amendment extended the privileges of the House floor to the Delegate under Rule XXXII.[6] Other amendments included the Delegate within the class of persons entitled to the services of the Clerk under Rule III clause 3,[7] and to the services of the Sergeant at Arms under Rule IV clause 1.[8] The last amendment brought the Delegate within the definition of "Members" affected by the Code of Conduct of Rule XLIII.[9]

The House adopted House Resolution 5 on Jan. 22, 1971.[10]

Later in the 92d Congress, on Oct. 13, 1972,[11] the House amended the House rules to reflect the grant to Guam and the Virgin Islands of Delegate positions by the passage of House Resolution 1153. The resolution extended to all Delegates the right of admission to the floor, the services of the Clerk and Sergeant at Arms, and brought them within the scope of the Code of Conduct.

Committee Membership

§ 3.9 In the 92d and 93d Congresses, the House amended its rules to provide for the election, rather than the assignment, of the Resident Commissioner and Delegates to standing committees.

On Jan. 21, 1971, the opening day of the 92d Congress,[12] Wil-

5. 117 CONG. REC. 15, 92d Cong. 1st Sess.
6. *House Rules and Manual* § 919 (1973).
7. *House Rules and Manual* § 641–646 (1973).
8. *House Rules and Manual* § 648 (1973).
9. *House Rules and Manual* § 939 (1973).
10. 117 CONG. REC. 144, 92d Cong. 1st Sess.
11. 118 CONG. REC. 36013–23, 92d Cong. 2d Sess.
12. 117 CONG. REC. 144, 92d Cong. 1st Sess.

liam M. Colmer, of Mississippi, Chairman of the Committee on Rules, offered House Resolution 5, amending the standing rules of the House. Among the proposed changes was a complete revision of Rule XII, which had formerly provided for the Resident Commissioner from Puerto Rico to be assigned to the standing Committees on Agriculture, Armed Services, and Interior and Insular Affairs, and for the Delegates from Alaska and Hawaii to be similarly assigned to certain standing committees.(13) The new Rule XII proposed by House Resolution 5 provided:

> Strike out Rule XII, and insert in lieu thereof the following:
>
> RULE XII
>
> RESIDENT COMMISSIONER FROM PUERTO RICO AND DELEGATE FROM THE DISTRICT OF COLUMBIA
>
> 1. The Resident Comrmissioner to the United States from Puerto Rico shall be elected to serve on standing committees in the same manner as Members of the House and shall possess in such committees the same powers and privileges as the other Members.
>
> 2. The Delegate from the District of Columbia shall be elected to serve as a member of the Committee on the District of Columbia and shall be elected to serve on other standing committees of the House in the same manner as Members of the House and shall possess in all committees on which he ser.ves the same powers and privileges as the other Members.

The House adopted House Resolution 5 on Jan. 22, 1971.(14) At the opening of the 93d Congress, the House further amended Rule XII to provide for all Delegates to be elected to conmittees:(15)

> In Rule XII, clause 2 is amended to read as follows:
>
> The Delegate from the District of Columbia shall be elected to serve as a member of the Committee on the District of Columbia and each Delegate to the House shall be elected to serve on standing committees of the House in the same manner as Members of the House and shall possess in all committees on which he serves the same powers and privileges as the other Members.

Committee Powers and Privileges

§ 3.10 In the 92d and 93d Congresses, Delegates and the Resident Commissioner were extended all the powers and privileges of Members in

13. *House Rules and Manual* § 740 (1969). The references to the Hawaiian and Alaskan Delegates were obsolete, as those territories had become states (see §§ 3.4, 3.5, supra). For an amendment to the House rules in 1949 permitting the Alaskan Delegate to serve on an additional committee, see 95 CONG. REC. 10618, 81st Cong. 1st Sess., Aug. 2, 1949.

14. 117 CONG. REC. 144, 92d Cong. 1st Sess.

15. H. Res. 6, 119 CONG. REC. 26, 27, 93d Cong. 1st Sess., Jan. 3, 1973.

committees, including the right in committee to vote and to obtain seniority.

On Jan. 21, 1971, the opening day of the 92d Congress,[16] William M. Colmer, of Mississippi, Chairman of the Committee on Rules, offered House Resolution 5, amending the standing rules of the House. One portion of the resolution completely revised Rule XII, relating to committee service by the Resident Commissioner and Delegates.[17]

The proposed amendment not only provided for the Resident Commissioner from Puerto Rico and the Delegate from the District of Columbia to be elected to committees, but also extended to them all the powers and privileges in committee as those possessed by Members of the House (including the right to vote and to obtain seniority rights).[18]

The House adopted House Resolution 5 on Jan. 22, 1971.[19]

At the opening of the 93d Congress, the House further amended Rule XII to provide for all Delegates, including those from Guam and the Virgin Islands, to possess all the powers and privileges of Members in committees to which elected.[20]

§ 3.11 In the 93d Congress, the majority party caucus announced a policy extending full committee voting and seniority rights to the Delegates and the Resident Commissioner

On Mar. 15, 1973,[1] Philip Burton, of California, Chairman of the Democratic Study Group, announced the policy changes adopted by the Democratic Caucus at the beginning of the 93d Congress.

Among them was a policy providing that the Delegates from the District of Columbia, Guam, and the Virgin Islands, and the Resident Commissioner of Puerto Rico have full voting rights and seniority in committee.

16. 117 CONG. REC. 14, 92d Cong. 1st Sess.
17. See § 3.9, supra, for the text of the amendment.
18. Rule XII clauses 1 and 2, *House Rules and Manual* § 740 (1973).
19. 117 CONG. REC. 144, 92d Cong. 1st Sess.
20. H. Res. 6, 119 CONG. REC. 26, 27, 93d Cong. 1st Sess., Jan. 3, 1973 (see § 3.9, supra, for the text of the amendment).
1. 119 CONG. REC. 8018, 93d Cong. 1st Sess.

B. COMPENSATION AND ALLOWANCES

§ 4. Salary; Benefits and Deductions

The Constitution directs in article I, section 6, clause 1, that Senators and Representatives shall receive compensation for their services,[2] to be paid out of the Treasury of the United States.[3] Pursuant to that clause, the rate of compensation is fixed by statute and is periodically reviewed.[4] In the 90th Congress, there was established the Commission on Executive, Legislative, and Judicial Salaries, which commission reviews salaries periodically and submits a report to the President who then makes recommendations in his budget message.[5]

The salary of Members progressed from $6 per diem in the

2. Compensation is pay for official services and does not include allowances, which are reimbursement for actual or presumed expenses and which are additional and separable from the legal rate of compensation. *Smith* v *U.S.*, 158 U.S. 346 (1895). Therefore, where there has been no appropriation for an allowance, a Congressman cannot claim a constructive allowance as part of his compensation. *Wilson* v *U.S.*, 44 Ct. Cl. 428 (1909).

For discussion of allowances, see § 6, infra (travel), and § 8, infra (office, personnel, and supply allowances).

3. See also 2 USC § 47 (congressional compensation as "public accounts").

In the drafting and ratification of the Constitution, there was debate on whether any compensation should be allowed, or whether it should be allowed for only the House and not for the Senate. Story, *Commentaries on the Constitution of the United States,* §§ 851–52, Da Capo Press (N.Y., Repub. 1970).

It was specifically provided that the compensation be paid out of the U.S. Treasury, rather than the individual state treasuries, in order to insure the independence of the national legislature and the equality of compensation. *Id.* at § 854.

4. The constitutional authority for payment of congressional salaries does not stem from the general taxing and spending power of Congress but from the specific clause providing for a congressional salary to be paid. *Richardson* v *Kennedy,* 313 F Supp 1282 (W.D. Pa. 1970), aff'd mem. 401 U.S. 901 (1971) (taxpayer lacked standing to challenge congressional pay raise effected by the Commission on Executive Legislative, and Judicial Salaries).

As to the fixing of the congressional salary, early objections were voiced on the failure of the Constitution to provide a procedure for fixing and changing the salary. Story, *Commentaries on the Constitution of the United States,* § 855, Da Capo Press (N.Y., Repub. 1970).

5. For the establishment of the commission and for the 1969 congressional pay raise effected by the commission, see § 4.1, infra.

First Congress to a fixed amount of $42,500 per year in the 90th Congress.[6] The statutes also fix separate rates of salary for the Speaker and Majority and Minority Leaders of the House.[7]

Salary begins for Members-elect at the beginning of their term, even if Congress meets after the constitutional day of Jan. 3.[8] The actual entitlement to salary before Congress meets, depends, however, on the filing of duly-certified credentials.[9] Once Congress con-

6. Salaries, 1795 to 1906: $6 per diem before Mar. 4, 1795, $7 per diem after Mar. 4, Act of Sept. 22, 1789, 1 Stat. 70–71; reduced to $6 per diem, Act of Mar. 10, 1796, 1 Stat. 448; $1,500 annually, Act of Mar. 19, 1816, repealed by Act of Feb. 6, 1817, 3 Stat. 257; $8 per diem, Act of Jan. 22, 1818, 3 Stat. 404; $3,000 annually, Act of Aug. 16, 1856, 11 Stat. 48; $250 per month, Act of Dec. 23, 1857, 11 Stat. 367; $5,000 annually, Act of July 28, 1866, 14 Stat. 323; $7,500 annually, Act of Mar. 3, 1873, 17 Stat. 486; $5,000 annually, Act of Jan. 20, 1874, 18 Stat. 4.

1907 to 1936: $7,500 annually, Act of Feb. 26, 1907, 34 Stat. 993; $10,000 annually, Act of Mar. 4, 1925, 43 Stat. 1301; $9,000 annually, Act of June 30, 1932, 47 Stat. 401 (Economy Act of 1932); $8,500 annually, Act of Mar. 20, 1933, 48 Stat. 14 (Economy Act of 1933); $9,000 annually, Act of Mar. 28, 1934, 48 Stat. 521; $9,500 annually, Act of May 30, 1934, 48 Stat. 821; $10,000 annually, Act of Feb. 13, 1935, 49 Stat. 24.

Since 1936: $12,500 annually, effective Jan. 3, 1947, Act of Aug. 2, 1946, 60 Stat. 850; $22,500 annually, Act of Mar. 2, 1955, 69 Stat. 11; $30,000 annually, effective Jan. 3, 1965, Act of Aug. 14, 1964, 78 Stat. 415; $42,500 annually, effective Mar. 1, 1969, Act of Dec. 16, 1967, Pub. L. No. 90–206, 81 Stat. 613 (codified as 2 USC § 31); $57,500 annually, effective Mar. 1, 1977 (recommendations of President submitted Jan. 17, 1977, pursuant to Pub. L. No. 90–206).

7. Under 2 USC § 31, as amended by the Act of Sept. 15, 1969, Pub. L. No. 91–67, 83 Stat. 107, the Speaker receives $62,500 annually, and the Majority and Minority Leader receive $49,500 annually.

Prior to the passage of Pub. L. No. 91–67, the Majority and Minority Leaders received the same salary as the other Members. Their pay raise was effected by the recommendations of the Commission on Executive, Legislative, and Judicial Salaries, as transmitted to Congress in the Presidential Budget Message for 1970. H. Doc. No. 91–51, 91st Cong. 1st Sess., Jan. 17, 1969.

8. 2 USC 34.

9. Members-elect receive compensation monthly between the beginning of the term and the convening of Congress under 2 USC § 34, but only if the Clerk has received a certificate showing regular election under 2 USC § 26. A person who presents regular credentials must be placed on the Clerk's roll and must receive salary from the beginning of his term. *Page* v *U.S.*, 127 U.S. 67 (1888).

venes, salaries are regularly paid only to those Members who have taken the oath and who have duly qualified for seats in the House.(10) If a Member-elect does not have credentials on file, or if his right to a seat is challenged, he is paid retroactively to the beginning of the term once his right to a seat is determined.(11)

As for the salary of Members elected to fill unexpired terms, the statutes formerly provided that such a Member would receive salary from the time that the compensation of his "predecessor" ceased.(12) The code now provides that where a person is elected to fill an unexpired term, his salary commences on the date of his election and not before.(13)

The Sergeant at Arms is the accounting and disbursing officer for the salaries of Members.(14) Before the salaries are paid out of United States Treasury, however, salary accounts are certified by the Speaker if the House is in session (15) or by the Clerk if the

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If a territory elected a "representative" before admission into the Union, the person elected was entitled to congressional salary only from the time of the admission of the territory as a state into the Union. *Conway* v *U.S.*, 1 Ct. Cl. 69 (1863).

10. 2 USC § 35. The House may, however, authorize a Member-elect whose right to a seat is being investigated to receive salary and allowances pending the result of the investigation (see § 4.3, infra)

11. See § 4.5, infra.

12. Resolution of July 12, 1862, No. 54, 12 Stat. 624.

13. 2 USC § 37. For the Speaker's analysis of the change in the provision, see 6 Cannon's Precedents § 203.

14. 2 USC § 78. The function of the Sergeant at Arms in disbursing salary is also dictated by Rule IV clause 1, *House Rules and Manual* § 649 (1973), which was amended by H. Res. 5, 92d Cong. 1st Sess., Jan. 22, 1971, and H. Res. 1153, 92d Cong. 2d Sess., Oct. 13, 1972, to extend his services to all Delegates and the Resident Commissioner.

See also 31 USC § 148, which authorizes the Treasurer of the United States to disburse the Members' salaries in the case of the Sergeant at Arms' disability.

2 USC § 80 clarifies the Sergeant at Arms' duties in relation to the compensation of Members. When he presents the necessary certificates to the Treasurer of the U.S. for Members' salary, he is acting as a public agent. Where, however, he draws the salary for Members before it is properly due, the transfer of the money to him is not a payment to Members. *Crain* v *U.S.*, 25 Ct. Cl. 206 (1890).

15. 2 USC § 48. The Court of Claims has stated that the salary of Members is not dependent upon the Speaker's certificate. *Wilson* v *U.S.*, 44 Ct. Cl. 428 (1909) (dicta). However, the Speaker's certificate, even if in the form of a personal letter, is conclusive upon the accounting officers of

House is not in session.[16] Congressional salaries are paid out monthly, by statutory mandate, both before and after Congress convenes.[17]

The salaries of Members are subject to deductions for federal income tax, and may be made subject, at the election of the individual Member, for deductions for retirement, health, and insurance benefits.[18] Authorized by statute are deductions for unauthorized leaves of absence,[19] for withdrawal from the congressional seat,[20] and for delinquency indebtedness.[1]

On one occasion, the House directed that a monthly deduction be levied from a challenged Member's-elect salary as punishment for improper conduct in past Congresses.[2]

In the event that a Member dies during his term of office, and was due unpaid salary, such salary goes to his designated beneficiary by statute, or to his widow or widower, or children, or parents, or to the person so entitled under state domiciliary law.[3] Customarily, the House appropriates an amount equal to one year's congressional salary to the widow of a deceased Member.[4] Any such death gratuity payment must be construed as a gift to the specified donee.[5]

The question arises as to whether a Member-elect of Congress may receive dual compensation both for (1) his congressional seat and (2) an incompatible office held

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the Treasury. 6 Cannon's Precedents § 201.

The Speaker may designate a substitute to sign the certificates in his name. 2 USC § 50.

16. 2 USC § 49.

17. 2 USC § 34 (before convening) and 2 USC § 35 (after oath-taking).

18. See § 4.10, infra.

19. 2 USC § 39.

Deductions from a Member's salary for unauthorized leaves may only be taken after he has been sworn in. 2 Hinds' Precedents § 1154. For information on leaves of absence, see § 5, infra. On one occasion, a Member requesting a leave of absence not for official business requested a leave of absence without pay (§ 5.10, infra).

20. 2 USC § 40.

1. 2 USC § 40a.

2. See § 4.4, infra.

3. 2 USC § 38a. The claim of the estate of a deceased Member is handled by the Committee on the Judiciary (see § 4.12, infra).

Where a Member took leave of absence for military service, and after the Sergeant at Arms had ceased paying Members absent for that purpose, the House paid the deceased's widow the difference between his unpaid House salary and the military salary he had received (see § 4.13, infra).

4. 6 Cannon's Precedents § 204.

5. 2 USC § 38b.

up to the time he takes the oath.(6) When that problem recently arose for a Senator-elect, he waived his congressional salary up to the time he took the oath and resigned from his office.(7) The House has not expressly ruled on the question whether a Representative would be required to do the same.(8)

During World War I Members who served in the military forces during their congressional terms received compensation for both positions.(9) During World War II, however, the Sergeant at Arms did not pay those Members absent for military training or service during their terms, pursuant to an opinion of the Comptroller General.(10) When drafting a bill providing for United States representation in the United Nations, Congress specifically provided that any Congressman appointed to the position not receive salary for that position, in order to avoid the prohibition against holding incompatible offices.(11)

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6. 14 Op. Att'y Gen. 406 (1874) proposed that since a Member-elect could lawfully hold an office under the United States until appearing to be sworn (see § 13, infra), he was entitled to receive pay for both positions before becoming a Member (assuming Congress met after the beginning of the term). That conclusion was based in part on the decision in *Converse* v *U.S.*, 62 U.S. (21 How.) 463 (1859), that a person holding two compatible offices under the government is not precluded from receiving the salaries of both by any provision of the general laws prohibiting double compensation. See also 9 Op. Att'y Gen. 508 (1860) and 12 Op. Att'y Gen. 459 (1868).

7. See § 4.9, infra.

8. See the determination of the House, cited at 1 Hinds' Precedents § 500, that a Member-elect receiving pay as a military officer was disqualified from taking his congressional seat or from receiving any congressional salary as of the moment the Congress to which he was elected convened, regardless of the time when he would appear to take the oath (the main issue before the committee was not, however, the status of that Member-elect, who resigned before taking the oath, but the entitlement to salary of his successor).

A report cited at 1 Hinds' Precedents § 184, while determining that a Member-elect could receive compensation for another governmental office before the convening of Congress, stated that the precedents of the House did not "determine that he [the Member-elect] may also be compensated as a Member of Congress for the same time for which he was compensated in the other office." The question was left open in the report.

9. See 6 Cannon's Precedents § 61.

10. See § 4.6, infra. See also § 4.13, infra (effect of military absence on payment of congressional salary to widow of deceased ex-Member).

11. See § 4.7, infra. See *U.S.* v *Hartwell*, 73 U.S. 385, 393 (1868), implying

Congressional salary may be waived by a Member, in which case the sum is remitted to the Treasury of the United States.(12) For example, a Member who was to be imprisoned for a period of four months for a criminal conviction instructed the Sergeant at Arms to return his salary to the Treasury for that period.(13)

What has been said above is applicable to Delegates and the Resident Commissioner; contrary to prior practice,(14) they now receive the same salary as Members.(15) Rule IV clause 1, detailing the functions of the Sergeant at Arms in keeping accounts and disbursing pay to Members, was amended in the 92d Congress to explicitly entitle Delegates and the Resident Commissioner to the financial services of that officer.(16)

that another governmental office without compensation would not be incompatible.

12. 6 Cannon's Precedents § 203.
13. See § 4.8, infra.
14. 6 Cannon's Precedents § 201 (differentiation in salary between Members and Delegates and Resident Commissioners).
15. 2 USC § 31.
16. *House Rules and Manual* § 649 (1973). The amendments were accomplished by H. Res. 5, 92d Cong. 1st Sess., Jan. 22, 1971, and H. Res. 1153, 92d Cong. 2d Sess., Oct. 13, 1972.

Cross References

Monetary allowances, see § 6, infra (travel allowance) and § 8, infra (office and personnel allowances; supplies).
Compensation and incompatible offices, see § 13, infra.
Compensation for military service, see § 14, infra.
Deductions from compensation for absence, see § 5, infra.
Compensation of officers, officials and employees, see Ch. 6, supra.

Fixing Congressional Salary

§ 4.1 The Commission on Executive, Legislative, and Judicial Salaries, established in the 90th Congress, reviews congressional salaries and submits budget recommendations periodically.

There was established in the 90th Congress a Commission on Executive, Legislative, and Judicial Salaries.(17) The commission's functions are to review once every fourth year the salaries of identified federal officials, including

17. Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90–206, 61 Stat. 642, § 225 (2 USC §§ 351–361).
In *Richardson* v *Kennedy*, 313 F Supp 1282 (W.D. Pa.), aff'd mem., 401 U.S. 901 (1971), the Supreme Court affirmed a lower court decision that a taxpayer lacked standing to attack a congressional pay raise effected by the commission.

Congressmen, and to submit a report to the President embodying suitable budget recommendations.[18]

Pursuant to the report of the commission in 1969, and to the President's budget proposals incorporating its recommendations, the congressional salary was increased to $42,500 per annum in 1969.[19]

Funds for Salary

§ 4.2 The House authorized the Clerk by resolution to transfer unexpended funds to the Sergeant at Arms in order to pay the salaries of Members, where the supplemental appropriation bill was pending before the Senate.

On May 28, 1969, a resolution was called up authorizing the transfer of funds left over from 1968 House appropriations and of funds for 1969 House appropriations, in order to meet the payroll of the House:[20]

> MR. [SAMUEL N.] FRIEDEL [of Maryland]: Mr. Speaker, by direction of the Committee on House Administration, I call up the resolution (H. Res. 425) and ask unanimous consent for its immediate consideration.
>
> THE SPEAKER:[1] Is there objection to the request of the gentleman from Maryland?
>
> There was no objection.
>
> The Clerk read the resolution, as follows:
>
> H. RES. 425
>
> *Resolved,* That the Clerk of the House and Sergeant at Arms be and is hereby directed to pay such sum as may be necessary, from the balance available of the 1968 appropriation and the various funds of the 1969 appropriation, where balances may be available, for the House of Representatives to meet the May and June payroll of Members, officers of the House, and employees of the House. Moneys expended from these funds and/or appropriations by the Sergeant at Arms and the Clerk will be repaid to the funds and/or appropriations from the Sergeant at Arms and Clerk's supplemental appropriation upon its approval.

The House adopted the resolution, after Mr. Friedel explained that the purpose of the resolution was to enable meeting the payroll

18. 2 USC § 356. For the membership of the commission, appointed by the President, the Speaker, the President of the Senate, and the Chief Justice, see 2 USC § 352.

19. Act of Sept. 15, 1969, Pub. L. No. 91–67, § 2, 83 Stat. 107.

For the President's 1969 salary recommendations, see 34 Fed. Reg. 2241 (1969), reprinted at 2 USCA § 358. For the President's message to Congress transmitting his recommendations and analyzing the commission, see Message from the President, H. Doc. No. 91–51, 91st Cong. 1st Sess.

20. 115 CONG. REC. 14165, 91st Cong. 1st Sess.

1. John W. McCormack (Mass.).

of the House for the next month, pending enactment of a supplemental appropriation bill containing funds for such payroll.

Parliamentarian's Note: The resolution was not in fact privileged for consideration under Rule XI clause 22, since it did not involve payment from the contingent fund of the House.

Salary of Challenged Member-elect

§ 4.3 Where a Member-elect was excluded from the House pending an investigation of his right to be sworn, the House by resolution authorized salary and allowances for such Member pending a final determination of his right to the seat.

On Jan. 10, 1967,[2] the House agreed to House Resolution 1, as amended, excluding Member-elect Adam C. Powell, of New York, from the House pending an investigation of his right to be sworn. The resolution, referring to a select committee the question of his right to his seat, permitted Mr. Powell to draw all the pay, allowances, and emoluments authorized for Members of the House:

> *Resolved,* That the question of the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House to be appointed by the Speaker, four of whom shall be Members of the minority party appointed after consultation with the minority leader. Until such committee shall report upon and the House shall decide such question and right, the said Adam Clayton Powell shall not be sworn in or permitted to occupy a seat in this House. . . .
>
> Until such question and right have been decided, the said Adam Clayton Powell shall be entitled to all the pay, allowances, and emoluments authorized for Members of the House.

§ 4.4 When affirming the right of a Member-elect to his seat, challenged for improper conduct in past Congresses, the House may provide for punishment by levying deductions from his congressional salary.

On Jan. 3, 1969, the House authorized by resolution (H. Res. 2) challenged Member-elect Adam C). Powell, of New York, to take his seat.[3] Clause 2 of House Resolution 2 read as follows:

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2. 113 CONG. REC. 24, 90th Cong. 1st Sess.

3. 115 CONG. REC. 34, 91st Cong. 1st Sess.

For a summary of Mr. Powell's alleged improper conduct in past Congresses, see the remarks of Mr. Gillespie V. Montgomery (Miss.), *id.* at p. 21.

That as punishment Adam Clayton Powell be and he hereby is fined the sum of $25,000, said sum to be paid to the Clerk to be disposed of by him according to law. The Sergeant at Arms of the House is directed to deduct $1,150 per month from the salary otherwise due the said Adam Clayton Powell, and pay the same to said Clerk until said $25,000 fine is fully paid.[4]

§ 4.5 Where a challenged Member-elect was declared entitled to a seat following a recount of the votes cast in the election, the House adopted a resolution entitling him to congressional salary from the beginning of the term to which elected.

On June 14, 1961,[5] the House adopted House Resolution 339, reported as privileged from the Committee on House Administration, declaring that J. Edward Roush, of Indiana, was entitled to a seat in the House from the Fifth Congressional District of Indiana. The committee had conducted a recount of the votes cast in the election, pursuant to House Resolution 1 of the 87th Congress.

The House then adopted House Resolution 340, also reported as privileged from the Committee on House Administration, providing that Mr. Roush be entitled to compensation, mileage, allowances, and other emoluments from the commencement of the term of the 87th Congress (and providing suitable compensation for the other contestant for the seat):

Resolved, That the House of Representatives having considered the question of the right of J. Edward Roush or George O. Chambers, from the Fifth Congressional District of Indiana, to a seat in the House in the Eighty-seventh Congress, pursuant to H. Res. 1, Eighty-seventh Congress, and having decided that the said J. Edward Roush is entitled to a seat in the House in such Congress with the result that the said J. Edward Roush is entitled to receive and will be paid the compensation, mileage, allowances, and other emoluments of a Member of the House from and after January 3, 1961, there shall be paid out of the contingent fund of the House such amounts as are necessary to carry out the provisions of this resolution in connection with such decision of the House, as follows:

(1) The said George O. Chambers shall be paid an amount equal to compensation at the rate provided by law for Members of the House for the period beginning January 3, 1961, and ending on the date of such decision of the House.

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4. For legal basis for the salary deductions, as based on the constitutional power of the House to punish Members, see the remarks of Mr. Frederick Schwengel (Iowa), *id.* at pp. 32, 33. Mr. Schwengel also stated that the resolution would not bar civil litigation to recover any moneys found to be due Congress from Mr. Powell. *Id.* at p. 33.

5. 107 CONG. REC. 10391, 87th Cong. 1st Sess.

(2) The said J. Edward Roush and the said George O. Chambers each shall be paid an amount equal to the mileage at the rate of 10 cents per mile, on the same basis as now provided by law for Members of the House, for each round trip between his home in the Fifth Congressional District of Indiana and Washington, District of Columbia, in response to the request of the Committee on House Administration for his appearance before the committee in connection with the investigation authorized by H. Res. 1, Eighty-seventh Congress.

(3) The said J. Edward Roush and the said George O. Chambers each shall be reimbursed for those expenses actually incurred by him in connection with the investigation by the Committee on House Administration authorized by H. Res. 1, Eighty-seventh Congress, in accordance with that part of the first section of the Act of March 3, 1879 (20 Stat. 400; 2 U.S.C. 226), which provides for payment of expenses in election contests.

Dual Compensation

§ 4.6 During World War II, the Sergeant at Arms of the House did not disburse congressional salary to those Members who were presently on leaves of absence and serving in the military.

In accordance with an opinion given him by the Comptroller General, Sergeant at Arms of the House Kenneth Romney, did not pay congressional salary to those Members of the House who were during World War II on leaves of absence because of service in the armed forces. The action was taken because such service was construed as incompatible with House service.(6)

§ 4.7 The House passed a bill denying extra compensation for any Member appointed as a United Nations representative, thereby avoiding in such cases the prohibition against holding incompatible offices.

On Dec. 18, 1945, the House was considering a proposed bill to provide for the participation of the United States in the United Nations.(7) A committee amendment was offered to the bill, denying compensation for the position of

6. See H. REPT. NO. 2037, from the Committee on House Accounts, to accompany H. Res. 512, 79th Cong. 2d Sess. (H. Res. 512 authorized the Sergeant at Arms to pay the widow of a deceased ex-Member the difference between his congressional pay and his military pay, where the ex-Member had obtained a leave of absence from the House to serve in the armed forces. In accordance with the practice of the Sergeant at Arms during the war, neither the Member nor his widow could draw full compensation for both positions.)

7. 91 CONG. REC. 12267, 79th Cong. 1st Sess.

representative to the United Nations for any Member who might be designated as such representative; the amendment had been drafted in order to avoid the possible conflict of a Member holding an incompatible office with compensation, under article I, section 6, clause 2, of the Constitution.[8] Before the House agreed to the amendment,[9] Mr. Sol Bloom, of New York, explained that it would not preclude a Member appointed as representative to the United Nations from receiving an expense allowance for duties connected with that office.[10]

Waiver of Salary

§ 4.8 When a Member was imprisoned for a criminal offense for a four-month period during a term of Congress, he instructed the Sergeant at Arms to return his salary to the Treasury during that four-month period.

On May 3, 1956, Mr. Thomas A. Lane, of Massachusetts, requested by letter the Sergeant at Arms of the House to return his congressional salary covering the period from May 7, 1956, to Sept. 7, 1956, to the Treasury of the United States. During that four-month period, Mr. Lane served a criminal sentence for income tax evasion.[11]

§ 4.9 A Senator-elect who continued to hold an incompatible office beyond the convening of Congress waived his congressional salary up to the time he resigned that office and took the oath.

Jacob K. Javits, Senator-elect from New York, did not appear on Jan. 3, 1957, the opening day of the 85th Congress, to take the oath with the rest of the Senate, but was administered the oath on Jan. 9, 1957.[12] No objection was made to the administration of the oath to Mr. Javits, although he did not resign from his position as attorney general of the State of

8. See the House report on said amendment, H. REPT. No. 1383, 79th Cong. 1st Sess. By removing compensation for the position, if held by a Member, the amendment removed the office from the Supreme Court's definition of an incompatible office, a "term (which) embraces the ideas of tenure, duration, emoluments, and duties." *U.S.* v *Hartwell*, 73 U.S. 385, 393 (1868).

9. 91 CONG. REC. 12286, 79th Cong. 1st Sess.

10. 91 CONG. REC. 12281, 79th Cong. 1st Sess.

11. See *U.S.* v *Lane*, United States District Court for Massachusetts, Criminal No. 56–51–W.

12. 103 CONG. REC. 340, 85th Cong. 1st Sess.

New York until the day he appeared to take the oath of office in the Senate.[13] Mr. Javits waived his congressional salary for the period prior to his taking of the oath.[14]

Retirement, Health, and Insurance Benefits

§ 4.10 Members are eligible for Civil Service retirement, health, and insurance benefits.

Members of Congress may elect to participate in a Civil Service Retirement System, initiated for them by the Legislative Reorganization Act of 1946.[15] To fund the optional program, deductions are made from the Member's congressional salary.[16] Members may also elect to receive life and health insurance.[17]

§ 4.11 Where Members were shot by persons in the House Gallery, the House adopted a resolution paying from the contingent fund amounts to defray hospital, medical, and nursing expenses in the treatment of their injuries.

On Mar. 4, 1954,[18] the House authorized by resolution that there be paid out of the contingent fund of the House necessary amounts to defray the medical expenses and the treatment of injuries of those Members of the House who were hit by bullets fired by several occupants of the House galleries on Mar. 1, 1954. Mr. Charles A. Halleck, of Indiana, delivered remarks in explanation of the resolution:

> MR. HALLECK: Mr. Speaker, I ask unanimous consent for the immediate consideration of House Resolution 456.

13. *Biographical Directory of the American Congress 1774–1971,* S. DOC. NO. 92–8 pp. 1183, 1184, 92d Cong. 1st Sess. (1971).

14. *Senate Manual* § 863 (1971) (statistical section).

An early opinion of the Attorney General proposed that until taking the oath a Representative-elect could receive salary for both his congressional position and his incompatible office. 14 Op. Att'y Gen. 408 (1874), cited at 2 USCA § 25.

15. Pub. L. No. 79–601, 60 Stat. 850, Ch. 753, § 602, Aug. 2, 1946, codified in 5 USC § 8331(2). A Member or Delegate must give notice in writing to the official by whom paid in order to become subject to retirement.

16. 5 USC § 8334. As of 1973, the deduction was eight percent of salary. To be eligible for benefits, an ex-Member must be at least 62 years old and have completed at least five years civilian service or be at least 60 years old and have completed 10 years Member service. 5 USC § 8336(f).

There is no mandatory retirement age for Members of Congress. See 5 USC § 8335.

17. 5 USC § 8901–8905 (health); 5 USC §§ 8701, 8702 (life).

18. 100 CONG. REC. 2709, 83d Cong. 2d Sess.

The Clerk read as follows:

Resolved, That there shall be paid out of the contingent fund of the House such amounts as may be necessary to defray hospital, medical, and nursing expenses in the treatment of injuries incurred in the House of Representatives by its Members during the session of the House on March 1, 1954.

THE SPEAKER:[19] Is there objection to the present consideration of the resolution?

MR. [SAM] RAYBURN [of Texas]: Mr. Speaker, reserving the right to object, and of course I am not going to, will the gentleman from Indiana explain the resolution?

MR. HALLECK: Mr. Speaker, this resolution was introduced by our colleague from Michigan [Mr. Cederberg], a very close friend of one of our colleagues who was injured the other day.

The purpose of the resolution is to provide for payment out of the contingent fund of the House of the necessary medical and hospital expenses for our five colleagues who were so tragically wounded on the House floor the other day. They were here on duty in the House of Representatives. It seems to me and to everyone with whom I have discussed this matter it is only fair and right that the hospital and medical expenses which they are incurring in the treatment of their wounds be borne out of the contingent fund of the House of Representatives.

MR. RAYBURN: Mr. Speaker, I withdraw my reservation.

THE SPEAKER: Is there objection to the request of the gentleman from Indiana [Mr. Halleck]?

There was no objection.

Salary of Deceased Member

§ 4.12 The Committee on the Judiciary and not on House Administration has jurisdiction of resolutions providing that the Comptroller General approve payment of the claim of the estate of a former Member for salary due to such former Member.

On Aug. 5, 1954,[20] Mr. Carl M. LeCompte, of Iowa, asked unanimous consent that House Resolution 301 (below) be rereferred from the Committee on House Administration to the Committee on the Judiciary, since the resolution had the elements of a claim. There was no objection.

House Resolution 301 reads as follows:

Resolved, That in order to enable the Comptroller General to certify for payment, under the provisions of 31 USC § 712b, the claim of the estate of the late James M. Hazlett, a Member of the Seventieth Congress, who took office on March 4, 1927, and who resigned therefrom effective October 20, 1927, for the sum of $6,305.42, which sum represents the salary due and unpaid Mr. Hazlett for such period of service, the Speaker is hereby authorized, in pursuance of the provisions of 2 USC § 48, to certify the proper salary

19. Joseph W. Martin, Jr. (Mass.).

20. 100 CONG. REC. 13469, 83d Cong. 2d Sess.

certificates covering such period of congressional service.

In the next Congress, on June 20, 1955,[1] unanimous consent was granted that House Resolution 269, authorizing payment of the salary due to Mr. Hazlett, deceased, be referred to the Committee on the Judiciary.

§ 4.13 On one occasion, the House paid to the widow of an ex-Member the difference between his past due congressional pay and his military pay, where he had obtained a leave of absence to enter the military and later resigned his House seat to remain in the service.

On May 14, 1946,[2] the House adopted the following resolution:

> *Resolved,* That the Sergeant at Arms of the House of Representatives is hereby authorized and directed to pay to Catherine L. Harrington the sum of $2,448.76, which sum represents a difference between the congressional pay and military pay of her late husband, Vincent F. Harrington, a member of the Seventy-seventh Congress, who obtained a leave of absence therefrom, effective May 8, 1942, to enter the military service, and who resigned his congressional office on September 4, 1942.

In House Report No. 2307, accompanying the resolution, it was indicated that the resolution was drafted to comply with the practice of the Sergeant at Arms of the House during World War II of not disbursing congressional salary to those Members who took leaves of absence to serve in the military.[3]

§ 5. Leaves of Absence

While the House is in session, every Member must be present, unless excused or necessarily prevented from attendance.[4] There are two types of authorized absences, excused absences and leaves of absence. The former are temporary in nature and are granted during the call of the roll. This section discusses leaves of absence granted by the House, which are more permanent in nature, lasting at least one day's leave.

A request for leave of absence for a Member is usually presented by another Member following the legislative program for the day.[5] Although requests for leaves may be presented orally from the floor, they are properly presented by filing with the Clerk the printed form which is made available at

1. 101 CONG. REC. 8757, 84th Cong. 1st Sess.
2. 92 CONG. REC. 4998, 79th Cong. 2d Sess.
3. See § 4.6, supra.
4. Rule VIII clause 1, *House Rules and Manual* § 656 (1973).
5. See 4 Hinds' Precedents § 3151.

the desk of the Sergeant at Arms.[6] The requests are normally granted by unanimous consent, although they may be refused.[7] Requests for leaves of absence may be challenged as not being on official business, although in current practice Members do not challenge the good faith of others in asking leave.[8]

As shown in the excerpt from the Record below, the reason for a leave of absence may be simply stated as "official business" or may be specified, as in the case of illness in the Member's family: [9]

> By unanimous consent, leave of absence was granted to:
>
> Mr. Thompson of New Jersey (at the request of Mr. O'Hara) on account of family illness.
>
> Mr. Blanton (at the request of Mr. Jones of Tennessee), for today, on account of official business.
>
> Mr. Lowenstein (at the request of Mr. Albert), for today, on account of official business.
>
> Mr. Price of Texas (at the request of Mr. Arends), on account of emergency appendectomy.
>
> Mr. Baring (at the request of Mr. Burton of California), for today, on account of official business

The statutes authorize the Sergeant at Arms to levy pro rata deductions on the salaries of Members or Delegates absent for other than their sickness or the sickness of family members.[10] In addition, the Sergeant at Arms may deduct an amount equal to allowable mileage from congressional salary, where the Member withdraws from his seat and does not return before the adjournment of Congress without obtaining leave.[11] Not since 1914, however, have those provisions been enforced.[12] Due to the number of Members, and to the proliferation of their official duties in Congress, committee field work, and in their home states, enforcement is no longer feasible

Cross References

Administration of oath to absentees, see Ch. 2, supra.

Salary deduction for unauthorized leave, § 4, supra.

Application of constitutional immunities while absent, §§ 15–18, infra.

Compelling attendance of Members upon the House, Ch. 20, infra.

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6. See 6 Cannon's Precedents § 199.

7. See 2 Hinds' Precedents §§ 1142–1145.

8. See §§ 5.5, 5.6, infra.

9. 116 CONG. REC. 36769, 91st Cong. 2d Sess., Oct. 14, 1970.

10. 2 USC § 39, which has been construed as a congressional recognition that the money in the hands of the Sergeant at Arms is under his official control. *Crain* v *U.S.*, 25 Ct. Cl. 204 (1890).

11. 2 USC § 40.

12. See § 5.1, infra.

Salary Deductions for Unauthorized Absence

§ 5.1 Since 1914, no deductions have been taken from Members' salaries for unauthorized leaves of absence.

The last docking of pay for unauthorized absences was accomplished by resolution on Aug. 25, 1914.(13)

Statement of Voting Position

§ 5.2 After a Member has taken a leave of absence, he may by unanimous consent insert in the Record a statement on how he would have voted on matters considered during his absence.

On Dec. 21, 1970,(14) Mr. Harold R. Collier, of Illinois, was granted unanimous consent to insert in the Record the statement of the manner in which he would have voted during his leave of absence of the prior week, had he been present in the House. Mr. Collier then listed in the Record the roll calls that were voted on the prior week, the subject of each roll call, and the vote he would have made thereon.

13. 6 Cannon's Precedents § 198.

14. 116 CONG. REC. 43136, 91st Cong. 2d Sess.

Leave for Military Service

§ 5.3 At the beginning of World War II, the House granted leaves of absence to Members for training and service in the Armed Forces of the United States.

On June 10, 1941,(15) the House granted a leave of absence to a Member for three weeks, in order to attend military training as a lieutenant colonel in the Officers Reserve Corps:

LEAVE OF ABSENCE

By unanimous consent, leave of absence was granted to Mr. Scrugham, for 3 weeks, on account of military training, Army antiaircraft artillery school.

On Oct. 23, 1941,(16) the House granted indefinite leaves of absence to a Member for duty as a military officer:

MR. [SCHUYLER OTIS] BLAND [of Virginia]: Mr. Speaker, our colleague from Virginia, Hon. Dave E. Satterfield, Jr., has long been a member of the Naval Reserve, and has been ordered to temporary duty. I ask unanimous consent that he be granted leave of absence indefinitely.

THE SPEAKER:(17) Is there objection to the request of the gentleman from Virginia?

15. 87 CONG. REC. 4991, 77th Cong. 1st Sess.

16. 87 CONG. REC. 8210, 77th Cong. 1st Sess.

17. Sam Rayburn (Tex.).

There was no objection.

Similar leaves of absence were granted on May 8, 1942.[18]

§ 5.4 During World War II, Members absent from the House for military service returned to their congressional duties after the War and Navy Departments stated their opposition and after those Members ceased receiving congressional salary.

Immediately prior to and during the first months of World War II, various Members took leaves of absence in order to serve in the military.[19] On June 1, 1942, however, there were inserted in the *Congressional Record* letters from the Secretary of War and Secretary of the Navy opposing the enlistment or commissioning of Members since they could render greater service by continuing to represent their constituents.[20] And in accordance with an opinion given him by the Comptroller General, the Sergeant at Arms of the House ceased paying congressional salary to those Members absent on military service.[1]

Most of those Members then resigned from the military and returned to attendance in the House.[2]

Challenging Requests for Leave

§ 5.5 The good faith of a Member in requesting a leave of absence is not customarily questioned by other Members of the House.

On Sept. 29, 1967,[3] when Mr. Charles A. Vanik, of Ohio, arose to reserve the right to object to requests presented for leaves of absence, the House Minority Leader, Gerald R. Ford, of Michigan, commented as follows on the reservation of objection:

MR. GERALD R. FORD: Mr. Speaker, I did not hear the full observation or comment of the gentleman from Ohio, but I would only say this: To my knowledge, in my 19 years here, I have never heard anybody on either side of the aisle challenge the good faith of a Member who was seeking leave of absence on account of official business.

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18. 88 CONG. REC. 4028, 77th Cong. 2d Sess.

A number of other Members took leaves for military service. See H. REPT. NO. 2037, accompanying H. Res. 512, 79th Cong. 2d Sess.

19. See § 5.3, supra.

20. 88 CONG. REC. A–2015, 77th Cong. 2d Sess.

1. See H. REPT. NO. 2037, accompanying H. Res. 512, 79th Cong. 2d Sess.

2. See § 14, infra, for more complete details on the military service of Members.

3. 113 CONG. REC. 27314, 27315, 90th Cong. 1st Sess.

Mr. Vanik withdrew his reservation of objection.

§ 5.6 On one occasion a Member, proceeding under a reservation of objection to a request for leaves of absence for certain Members on "official business," questioned whether their business was, in fact, "official" and then withdrew his reservation.

On Sept. 29, 1967,[4] there were laid before the House requests of five Members for leaves on official business. Debate on the requests proceeded under a reservation of the right to object:

MR. [CHARLES A.] VANIK [of Ohio]: Mr. Speaker, reserving the right to object, I would like to raise an issue, that two of the gentlemen that asked for official leave, to be absent from sessions from tbe House of Representatives, are among those who have been urging the Speaker to have sessions through Saturday, and to start sessions at 11 o'clock in the morning. I would like to know if this really is official business these two gentlemen are engaged upon, or is it some other kind of mission? . . .

. . . I was wondering if the distinguished minority leader might be able to clear up the question I raised about these gentlemen, who are among those who are very much responsible for our being here on a bill which we could have finished yesterday. They asked for sessions on Friday and Saturday, and they are not here today, and now they have asked for official leave of absence. I think this is a perfectly bona fide request, and I would like to know, I would like to be assured they are truly involved in something that relates to the business of the House of Representatives.

MR. GERALD R. FORD: Mr. Speaker, let me repeat a little differently what I said a moment ago: We have never challenged the veracity of a Member who asked for a leave of absence or the basis on which a Member asked for leave of absence based on the signature of the leader. We do not intend to in the future. We have to do a great deal of business in this Chamber based on faith and trust in one another. I assume when a Member on this side of the aisle asks for a leave of absence on account of official business, that it is for a legitimate purpose. I do not know in this particular case the precise details, but I would suggest the gentleman make his inquiry to the Chair and not to me.

MR. [WAYNE L.] HAYS [of Ohio]: Mr. Speaker, will the gentleman yield?

MR. VANIK: I yield to the gentleman from Ohio.

MR. HAYS: Mr. Speaker, I think it would be fair to assume the two gentlemen in question are on official business and that the letter they sent was a little pleasant demagoguery which did not add too much to anything.

MR. VANIK: Mr. Speaker, I will withdraw my opposition, but I think the point has been made. I certainly appreciate the position of the majority leader and the minority leader when they

4. 113 CONG. REC. 27314, 27315, 90th Cong. 1st Sess.

submit these requests on behalf of Members. I think the 28 signers of the letter complaining about slowness of business in the House of Representatives have, in effect, questioned the actions of the entire House of Representatives. I think, insofar as they have done this, and tried to discipline the entire House, they themselves are subject to question in their motives and in their own attendance records in the House.

Mr. Speaker, I withdraw my reservation of objection.

The several personal requests were agreed to.

Absences Not on Official Business

§ 5.7 A leave of absence from a date certain to the end of the session was granted a Member who listed as his reason a desire to be with his family in Europe during the Christmas season.

On Dec. 20, 1969,(5) the House granted a leave of absence by unanimous consent to Mr. Wayne N. Aspinall, of Colorado, from Dec. 22, 1969, until the end of the first session, to enable him to spend Christmas with his family in Europe.

§ 5.8 When a Member was imprisoned for a criminal offense for a four-month period during the term of Congress, he instructed the Sergeant at Arms to return his salary to the Treasury during that four-month period.

On May 3, 1956, Mr. Thomas A. Lane, of Massachusetts, requested by letter the Sergeant at Arms of the House to return his congressional salary covering the period from May 7, 1956, to Sept. 7, 1956, to the Treasury of the United States. During that four-month period, Mr. Lane served a criminal sentence for income tax evasion.(6)

§ 5.9 A Member was granted a leave of absence for maternity reasons.

On Nov. 1, 1973, a leave of absence was granted to Mrs. Yvonne B. Burke, of California. The Record noted:(7)

> By unanimous consent leave of absence was granted to:
>
> Mrs. Burke of California (at the request of Mr. Hawkins), on account of maternity leave.

§ 5.10 The House granted a leave of absence to a Member, without pay, at his request, while he conducted a

5. 115 CONG. REC. 40491, 91st Cong. 1st Sess.

6. See *U.S.* v *Lane*, United States District Court for Massachusetts, Criminal No. 56–51–W.

7. 119 CONG. REC. 35653, 35662, 93d Cong. 1st Sess.

campaign for another political office.

On Sept. 20, 1971,[8] a leave of absence was granted without pay:

> . . . Mr. Edwards of Louisiana, effective September 8, without pay, on account of the campaign for Governor of the State of Louisiana.

§ 6. Travel

There are three types of travel by individual Members for which they may receive allowances or reimbursement: travel to and from the home district; other domestic travel on official House business; and limited overseas travel on official House business. Allowances or reimbursement must be made pursuant to specific authorization, as the congressional compensation dictated by the Constitution[9] only extends to pay for official services, and not to reimbursement for expenses incurred through performance of such duties.[10]

Each Member is entitled to a mileage allowance for travel to and from each regular session of Congress.[11] The rate of reimbursement for such travel has been maintained at 20 cents a mile if by automobile, and at the actual cost of transportation if travel is by common carrier. Payments are computed on a basis of actual automobile speedometer readings, limited by a standard mileage guide, and are credited to the individual Member's account by the Sergeant at Arms at the beginning of each session.[12]

Each Member may also be reimbursed, at 12 cents a mile, for a certain number of round trips to his home district during the session.[13] As alternate payment, a

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8. 117 CONG. REC. 32430, 92d Cong. 1st Sess.

9. U.S. Const. art. I, § 6, clause 1.

10. Allowances are reimbursement for actual or presumed expenses and are additional and separable from the legal rate of compensation. *Smith* v *U.S.*, 158 U.S. 346 (1895).

Where there has been no congressional appropriation for a travel allowance for an extra session of Congress, a Congressman cannot claim a constructive allowance as part of his compensation. *Wilson* v *U.S.*, 44 Ct. Cl. 428 (1909).

11. 2 USC § 43. The provision applies to the Resident Commissioner from Puerto Rico and to the Delegates from Guam and the Virgin Islands (see 48 USC § 1715).

12. Regulations of Travel Expenses, issued by the Committee on House Administration, Mar. 1, 1971, p. 20.

13. The number of round trips per session was formerly codified (see 2 USC § 43b–1). In the 92d Congress, however, the Committee on House Administration became empowered by law to periodically review and ad-

Member or Delegate may elect to receive a lump-sum payment for transportation expenses each calendar year.(14) Members are also authorized a home district travel allowance for employees on official business.(15)

In the event that a special or extraordinary session is convened in addition to the two regular sessions of a Congress, the House may provide by resolution for additional mileage allowance for the expense incurred.(16) Where Congress fails to appropriate additional mileage expense for a special session, however, the Member must bear his own expense and cannot claim a "constructive" travel allowance.(17)

The Committee on House Administration has jurisdiction over measures relating to the travel of Members.(18) In addition, the committee has been authorized to make periodic adjustments in all allowances of Members, including the travel allowance, without any action required on the part of the House.(19)

The Sergeant at Arms keeps the accounts of mileage and disburses travel allowances to individual Members.(20) Before he may disburse such payment, however, the mileage account of each Member must be certified by the Speaker, if the House is in session,(1) or by the Clerk, if the House is not in session.(2)

Mileage accounts for trips to the home district during a session are paid out of the contingent fund of the House.(3)

The cost of other domestic travel outside the home district may be reimbursed by the House if the travel is undertaken on official House business. For example, travel for the purpose of performing committee business, such

just the allowances of Members, including the travel allowance (see § 6.2, infra).

14. The lump-sum payment was formerly dictated by 2 USC § 43b–1. The Committee on House Administration has since made adjustments to that amount (see § 6.3, infra).

15. See § 6.3, infra.

16. See § 6.7, infra.

17. *Wilson* v *U.S.*, 44 Ct. C1. 428 (1909).

18. See § 6.1, infra.

19. See § 6.2, infra.

20. 2 USC § 78 and Rule IV, *House Rules and Manual* § 649 (1973). Rule IV was amended by H. Res. 5, 92d Cong. 1st Sess., Jan. 22, 1971, and by H. Res. 1153, 92d Cong. 2d Sess., Oct. 13, 1972, to entitle Delegates and the Resident Commissioner to the services of the Sergeant at Arms.

1. 2 USC § 48. The Speaker may designate a substitute to certify the mileage accounts of Members and Delegates. 2 USC § 50.

2. 2 USC § 49.

3. 2 USC § 43b–1 and 2 USC § 57.

as investigations, may be funded from a committee's budget.[4] Likewise, where the House appoints a Member or Members to attend meetings or assemblies on behalf of the House, the House may by resolution authorize a travel allowance.[5]

Pursuant to regulations promulgated by the Committee on House Administration, the Speaker may designate persons not members or employees of a committee to assist in committee investigations and therefore obtain travel expenses.[6]

The third type of travel for which a Member may receive government funds is overseas travel. Such travel may be funded either through specific appropriations or through "counterpart" funds. Counterpart funds are those foreign currencies credited to the United States, in return for aid, which may be spent only in the country of origin. Such currencies are made available for Members abroad on the business of certain committees.[7] The use of counterpart funds is limited by statute and must be specifically authorized.[8] Any overseas travel by a committee member must be reported in detail, showing the number of days visited in each country, the amount of subsistence furnished, and the cost of the transportation. Printed forms for the purpose of making such reports are furnished by the Committee on House Administration. In addition, each committee must file an annual report on the funds spent by Congressmen and committee staff members traveling overseas on official business.[9]

Forms

Forms of joint resolution appropriating mileage allowances for Mem-

4. For funding of committee business, see Ch. 17, infra.

5. See § 6.5, infra. By statute, Members appointed to attend funeral ceremonies of deceased Members receive reimbursement for travel expenses. 2 USC § 124.

6. Regulations of Travel Expenses, issued by the Committee on House Administration, Mar. 1, 1971, p. 3.

7. See 2 USC § 1754(b).

8. See §§ 6.8, 6.9, infra, for instances of restrictions placed on overseas travel by the House. See also the reporting requirements and per diem restrictions of 2 USC § 1754(b).

9. For a summary of the House regulations relating to reimbursed overseas travel, see Regulations: Travel and Other Expenses of Committees and Members, Committee on House Administration, p. 2, 91st Cong., Jan. 1, 1970.

Congress may also restrict private funding of overseas travel for Congressmen; the 86th Congress agreed to an amendment to a ship construction subsidy bill which restricted free or reduced rate transportation for all federal employees. Pub. L. No. 86–607, 74 Stat. 362, July 7, 1960.

bers and others incident to a special session of Congress.

Resolved, etc., That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the payment of expenses incident to the second session of the Seventy-sixth Congress, namely:

. . . For mileage of Representatives, the Delegate from Hawaii, and the Resident Commissioner from Puerto Rico, and for expenses of the Delegate from Alaska, $171,000.(10)

Jurisdiction Over Travel

§ 6.1 The Committee on House Administration has jurisdiction over travel allowances and their adjustment.

The Committee on House Administration, created by the Legislative Reorganization Act of 1946,(11) has jurisdiction over measures relating to travel and has the added function of reporting to the Sergeant at Arms the travel of Members.(12)

Adjustments to Travel Allowances

§ 6.2 The Committee on House Administration became authorized by law in the 92d Congress to periodically renew and adjust the travel allowances of Members.

On July 21, 1971, the House agreed to House Resolution 457,(13) later enacted into permanent law,(14) a privileged resolution reported from the Committee on House Administration, which empowered that committee to periodically review and adjust the allowances of Members without requiring any action by the House.

During debate on the resolution, it was stated by Mr. Frank Thompson, Jr., of New Jersey, a member of the committee, that adjustment of allowances by the committee would be submitted to the House and printed in the *Congressional Record* on the day following a decision.(15)

House Resolution 457 read as follows:

Resolved, That (a) until otherwise provided by law, the Committee on House Administration may, as the committee considers appropriate, fix and adjust from time to time, by order of the committee, the amounts of allowances (including the terms, condi-

10. 85 CONG. REC. 16, 76th Cong. 2d Sess., Sept. 25, 1939.
11. 60 Stat. 812.
12. *House Rules and Manual* § 693 (1973).
13. 117 CONG. REC. 26451, 92d Cong. 1st Sess.
14. 2 USC § 57, enacted by Pub. L. No. 92–184, Ch. 4, 85 Stat. 636, Dec. 15, 1971.
15. 117 CONG. REC. 26445, 92d Cong. 1st Sess.

tions, and other provisions pertaining to those allowances) within the following categories:

(1) for Members of the House of Representatives, the Resident Commissioner from Puerto Rico, and the Delegate from the District of Columbia—allowances for clerk hire, postage stamps, stationery, telephone and telegraph and other communications, official office space and official office expenses in the congressional district represented (including, as applicable, a State, the Commonwealth of Puerto Rico, and the District of Columbia), official telephone services in the congressional district represented, and travel and mileage to and from the congressional district represented; and

(2) for the standing committees, the Speaker, the majority and minority leaders, the majority and minority whips, the Clerk, the Sergeant at Arms, the Doorkeeper, and the Postmaster of the House of Representatives-allowances for postage stamps, stationery, and telephone and telegraph and other communications.

(b) The contingent fund of the House of Representatives is made available to carry out the purposes of this resolution.

§ 6.3 On several occasions, the Committee on House Administration has submitted orders to the House adjusting the travel allowance of Members and their employees.

On Dec. 8, 1971,(16) Mr. Frank Thompson, Jr., of New Jersey, a member of the Committee on House Administration, submitted Order No. 2 of that committee, adjusting the travel allowance of House Members, pursuant to authority delegated to that committee by the House:

TO ADJUST THE ALLOWANCE FOR TRAVEL OF MEMBERS AND STAFF TO AND FROM CONGRESSIONAL DISTRICTS

Resolved, That effective January 3, 1971, until otherwise provided by order of the Committee on House Administration;

(a) The contingent fund of the House of Representatives is made available for reimbursement of transportation expenses incurred by Members (including the Resident Commissioner from Puerto Rico and the Delegate from the District of Columbia) in traveling, on official business, by the nearest usual route, between Washington, District of Columbia, and any point in the district which he represents, for not more than 24 round-trips during each Congress, such reimbursement to be made in accordance with rules and regulations established by the Committee on House Administration of the House of Representatives.

(b) The contingent fund of the House of Representatives is made available for reimbursement of transportation expenses incurred by employees in the office of a Member (including the Resident Commissioner from Puerto Rico and the Delegate from the District of Columbia) for not more than four round-trips during any Congress between Washington, District of Columbia, and any point in the Congressional

16. 117 CONG. REC. 45608, 45609, 92d Cong. 1st Sess.

district represented by the Member. Such payment shall be made only upon vouchers approved by the Member, containing a certification by him that such travel was performed on official duty. The Committee on House Administration shall make such rules and regulations as may be necessary to carry out this section.

(c) This order shall not affect any allowance for travel of Members of the House of Representatives (including the Resident Commissioner from Puerto Rico and the Delegate from the District of Columbia) which is authorized to be paid from funds other than the contingent fund of the House of Representatives.[17]

On Oct. 5, 1972,[18] Mr. Frank Thompson, Jr., of New Jersey, submitted a revised Order No. 2 as follows:

COMMITTEE ON HOUSE ADMINISTRATION: ORDER NO. 2—REVISED—TO ADJUST THE ALLOWANCE FOR TRAVEL OF MEMBERS AND STAFF TO AND FROM CONGRESSIONAL DISTRICTS

Resolved, That effective January 3, 1973, until otherwise provided by order of the Committee on House Administration;

(a) The contingent fund of the House of Representatives is made available for reimbursement of transportation expenses incurred by Members (including the Resident Commissioner from Puerto Rico) in traveling, on official business, by the nearest usual route, between Washington, District of Columbia, and any point in the district which he represents, for not more than 36-round trips during each Congress, such reimbursement to be made in accordance with rules and regulations established by the Committee on House Administration of the House of Representatives.

(b) The contingent fund of the House of Representatives is made available for reimbursement of transportation expenses incurred by employees in the office of a Member (including the Resident Commissioner from Puerto Rico) for not more than 6-round trips during any Congress between Washington, District of Columbia and any point in the Congressional district represented by the Member. Such payment shall be made only upon vouchers approved by the Member, containing a certification by him that such travel was performed on official duty. The Committee on House Administration shall make such rules and regulations as may be necessary to carry out this section.

(c) A Member of the House of Representatives (including the Resident Commissioner from Puerto Rico) may elect to receive in any Congress, in lieu of reimbursement of transportation expenses for such Congress is authorized in paragraph (a) above, a lump sum transportation payment of $2,250 for each Congress. The Committee on House Administration of the House of Representatives shall make such rules and regulations as may be necessary to carry out this section.

(d) This order shall not affect any allowance for travel of Members of the House of Representatives (including

17. For the allowance prior to the order, see 2 USC § 43(b), as amended by Pub. L. No. 90–86, 81 Stat. 226, Sept. 17, 1967.

18. 118 CONG. REC. 34177, 92d Cong. 2d Sess.

the Resident Commissioner from Puerto Rico) which is authorized to be paid from funds other than the contingent fund of the House of Representatives.

§ 6.4 Bills increasing the amount of allowable reimbursement for travel expenses for Members and their employees are not called up as privileged.

On Aug. 4, 1965,[19] a bill to increase the number of reimbursable round trips to the home district for each Member and for his employees was not called up as privileged since it amended existing law, although it did provide for expenditure from the contingent fund.

Similarly, on June 25, 1963,[1] the bill amending the Legislative Branch Appropriation Act of 1959 to provide for reimbursement of transportation expenses for Members for additional trips to their home districts was reported and called up as not privileged.

Travel for Appointees to Boards and Commissions

§ 6.5 The House adopted a privileged resolution appropriating from the contingent fund expenses for committee members to attend a meeting of a United Nations agency.

On Nov. 9, 1943,[2] the House adopted a privileged resolution from the Committee on Accounts (H. Res. 349):

> *Resolved,* That there shall be paid out of the contingent fund a sum not to exceed $500 to defray the actual expenses of such members of the Committee on Foreign Affairs as may be designated by the chairman thereof, to attend the meeting of the United Nations Relief and Rehabilitation Administration at Atlantic City, N.J., beginning Wednesday, November 10, 1943, on vouchers signed by the chairman and approved by the Committee on Accounts.

§ 6.6 Members of a committee appointed to attend an international conference were authorized by resolution to use foreign currencies credited to the United States for travel expenses, where the resolution granting the committee its investigatory authority in the same Congress did not authorize foreign travel.

On May 29, 1963, the House adopted a resolution called up by Mr. B. F. Sisk, of California, by direction of the Committee on

19. 111 CONG. REC. 19426, 89th Cong. 1st Sess.

1. 109 CONG. REC. 11528, 88th Cong. 1st Sess.

2. 89 CONG. REC. 9337, 78th Cong. 1st Sess.

Rules, relating to foreign travel by members of the Committee on Education and Labor:

Resolved, That the Speaker of the House of Representatives is hereby authorized to appoint a member from the majority and a member from the minority of the Committee on Education and Labor to attend the International Labor Organization Conference in Geneva, Switzerland, between June 1. 1963, and June 30, 1963.

He is further authorized to appoint as alternates a member from the majority and a member from the minority of the said committee.

Notwithstanding section 1754 of title 22, United States Code, or any other provision of law, local currencies owned by the United States shall be made available to the aforesaid delegates and alternates from the Committee on Education and Labor of the House of Representatives engaged in carrying out their official duties under section 190(d) of title 2, United States Code: *Provided,* (1) That no member of said committee shall receive or expend local currencies for subsistence in an amount in excess of the maximum per diem rates approved for oversea travel as set forth in the Standardized Government Travel Regulations, as revised and amended by the Bureau of the Budget; (2) that no member of said committee shall receive or expend an amount for transportation in excess of actual transportation costs; (3) no appropriated funds shall be expended for the purpose of defraying expenses of members of said committee in any country where counterpart funds are available for this purpose.

That each member of said committee shall make to the chairman of said committee an itemized report showing the number of days visited in each country whose local currencies were spent, the amount of per diem furnished and the cost of transportation if furnished by public carrier, or if such transportation is furnished by an agency of the U.S. Government, the identification of the agency. All such individual reports shall be filed by the chairman with the Committee on House Administration and shall be open to public inspection.[3]

The resolution authorizing the use of "counterpart" funds for the appointees was necessary, since the resolution adopted in the 88th Congress granting the Committee on Education and Labor investigatory authority (H. Res. 103) did not authorize foreign travel or the use of such funds for foreign travel.

Travel for Extra Sessions

§ 6.7 The House by resolution authorized the Clerk to pay from the contingent fund to the Sergeant at Arms an amount to cover additional mileage for Members for attendance at a meeting of Congress at a date earlier than that to which adjourned.

On Aug. 7, 1948,[4] the House adopted the following resolution,

3. 109 CONG. REC. 9799, 88th Cong. 1st Sess.

4. 94 CONG. REC. 10247, 80th Cong. 2d Sess.

subsequent to the convening of Congress on a date earlier than that to which it had adjourned:

> *Resolved,* That the Clerk of the House of Representatives is authorized and directed to pay to the Sergeant at Arms of the House of Representatives not to exceed $171,000 out of funds appropriated under the head "Contingent expenses of the House," fiscal year 1949, for additional mileage of Members of the House of Representatives, Delegates from Territories, and the Resident Commissioner from Puerto Rico, at the rate authorized by law.

Parliamentarian's Note: The Congress had adjourned from June 20, 1948, to Dec. 31, 1948. The President called the Congress back into session by proclamation on July 26, 1948, for the consideration of legislation mentioned in his message to Congress on July 27, 1948.

Overseas Travel

§ 6.8 The House adopted in the 88th Congress resolutions with committee amendments, reported from the Committee on Rules, authorizing committees to conduct investigations but restricting their use of counterpart funds (local foreign currencies owned by the United States).(5)

On Jan. 31, 1963, and Feb. 18, 1963, the Committee on Rules offered a number of resolutions authorizing certain House committees to conduct investigations. The committee offered amendments to each of those resolutions in relation to the use by committee members of "counterpart" funds, i.e., foreign currencies, credited to the United States in return for aid, which may be spent only in the country of origin.(6) The amendments agreed to by the House were those limiting overseas travel for Members to a maximum per diem rate, limiting expenses to actual transportation, and requiring counterpart funds to be exhausted before appropriated funds were used.(7)

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5. For regulations promulgating per diem reimbursement limits and reporting requirements on overseas travel for committee members, see Regulations: Travel and Other Expenses of Committee and Members, Committee on House Administration, 92d Cong., Mar. 1, 1971. For the statutory limitations and reporting requirements on use of such funds, passed into law in the 88th Congress, see 22 USC § 1754, as amended by Pub. L. No. 88–633, Pt. IV, § 402, 78 Stat. 1015, Oct. 7, 1964.

6. For a discussion of counterpart funds, past abuses in relation to them, and the purposes of the committee amendments, see the discussion at 109 CONG. REC. 1556–59, 88th Cong. 1st Sess., Jan. 31, 1963.

7. *Id.* at p. 1547.

For 10 other House committees, the House agreed to amendments authorizing no counterpart funds for members of those committees.(8) However, denial of such authorization did not preclude a committee from requesting specific authorization of the Committee on Rules for overseas travel funds for specific purposes.(9)

§ 6.9 Where members of a committee have no authority, under the committee's investigatory resolution, to travel overseas or to use foreign currencies while on committee business, the House may grant such authority when the Speaker appoints members of that committee as delegates to an international conference.

On May 31, 1963, Speaker John W. McCormack, of Massachusetts, appointed several delegates from the Committee on Education and Labor to attend the International Labor Organization Conference in Switzerland.(10) By virtue of that appointment, the delegates were authorized to travel overseas on official business and to use foreign currencies credited to the United States (pursuant to H. Res. 368) although the House Committee on Rules had previously disallowed use of governmental funds for overseas travel by members of the Committee on Education and Labor.(11)

§ 7. Franking

The franking privilege is the statutory right of Representatives to send certain material through the United States' mails without postage cost to themselves,(12) the cost being paid from public revenues.(13) Members, along with

8. *Id.* at pp. 1547–59; see also 109 CONG. REC. 2463, 88th Cong. 1st Sess., Feb. 18, 1963.

9. 109 CONG. REC. 1548, 1549, 1552, 88th Cong. 1st Sess., Jan. 31, 1963.

10. 109 CONG. REC. 9896, 88th Cong. 1st Sess.

11. 109 CONG. REC. 1553, 88th Cong. 1st Sess., Jan. 31, 1963. See § 6.6, supra, for further discussion.

12. For a statutory synopsis, see *House Rules and Manual* § 984 (1973). See also "Law and Regulations Regarding Use of the Congressional Frank," Subcommittee on Postal Service, Committee on Post Office and Civil Service, 92d Cong. 1st Sess. (1971).

Case decisions on the franking privilege are summarized in "The Franking Privilege of Members of Congress," special report of the Joint Committee on Congressional Operations, 92d Cong. 2d Sess. (Oct. 16, 1972).

13. Postage on franked correspondence is paid by a lump-sum appropriation to the legislative branch, which revenue is then paid to the postal service. 39 USC § 3216(a).

other federal officials, have enjoyed the privilege almost continuously from the founding of the Republic.(14) Although the scope and applicability of franking has varied through the history of Congress, only during a brief period in the 19th century was the privilege totally abolished.(15)

Members, Members-elect, House officers, and others entitled to the franking privilege may, until the first day of April following the expiration of their term of office, send free through the mails, under their frank, any matter relating to their "official business, activities, and duties, as intended" under the guidelines set out in title 39 of the United States Code.(16) The controlling statute prohibits franked mail containing certain material that is "purely personal or political" and prohibits "mass mailings" less than 28 days before elections in which the Member is a candidate.(17) It allows franked mailing "with a simplified form of address for delivery" (patron or occupant mail, for example) within certain limits.(18) Another provision (§ 3211)

14. See 1 Stat. 237, Feb. 20, 1792, an act which codified the entitlement of Representatives to use the frank. The passage of the act continued the practice which was established by the Continental Congress (see XXIII Journals of the Continental Congress, pp. 670–679).

15. The Act of Jan. 31, 1873, 17 Stat. 421, effective July 1, 1873, abolished the franking privilege. Limited use of the frank was reinstated in 1875 by 18 Stat. 343, §§ 5, 7, Mar. 30, 1875.

16. Prior to the enactment of Pub. L. No. 93–191, 39 USC § 3210 permitted franked mailing of certain matter on official or departmental business by a government official. That language resulted in uncertainty as to the scope of the privilege, and up until 1968 the Post Office Department, now the United States Postal Service, inquired on occasion into the proper use of the frank (see § 7.2, infra). For interpretation by the House Committee on Post Office and Civil Service prior to the enactment of Pub. L. No. 93–191, see Committee Print, Law and Regulations Regarding Use of the Congressional Frank, Subcommittee on Postal Service, Committee on Post Office and Civil Service, 92d Cong. 1st Sess. (1971).

For two notable judicial decisions on the scope of the franking privilege (decided prior to the passage of Pub. L. No. 93–191, clarifying the use of the frank), see *Hoellen* v *Annunzi*, 468 F2d 522 (7th Cir. 1972), cert. denied, 412 U.S. 953 (1973) and *Schiaffo* v *Helstoski*, 350 F Supp 1076 (D.N.J. 1972), rev'd 492 F2d 413 (1974).

17. 39 USC § 3210(a) (5).

18. 39 USC § 3210(d). Such mailings, within certain requirements, are also allowed to Members-elect, Delegates and Delegates-elect, and Resident

permits the officers as well as Members of the House to send and receive public documents through the mail until the first day of April following the expiration of their terms of office. And the *Congressional Record*, or any part or reprint of any part thereof, including speeches and reports contained therein, may be sent as franked mail, if consistent with the guidelines for such mail set out in section 3210. Seeds from the Department of Agriculture may be sent under the frank pursuant to section 3213.

In the event a Member, Delegate, or Resident Commissioner dies in office, the surviving spouse may send under the frank nonpolitical correspondence relating to the death for a period of 180 days thereafter under section 3218. In preparing material to be sent out under his frank, a Member is entitled to the services of the Public Printer.[19] The person entitled to the use of a frank may not loan it to another (§ 3215).

Cross References

Postage stamp allowance, § 8, infra.

Application of constitutional immunity to material mailed under the frank, §§ 15–17, infra.

Collateral References

Committee Print, Law and Regulations Regarding Use of the Congressional Frank, Subcommittee on Postal Service, Committee on Post Office and Civil Service, 92d Cong. 1st Sess. (1971).

The Franking Privilege of Members of Congress, Special Report of the Joint Committee on Congressional Operations, 92d Cong. 2d Sess. (Oct. 16 1972).

The Franking Privilege of Members of Congress, Committee Print, Joint Committee on Congressional Operations, 92d Cong. 2d Sess., Identifying Court Proceedings and Actions of Vital Interest to the Congress (Oct. 16, 1972).

Congressional Guidelines on Franking

§ 7.1 In the 93d Congress, the Congress passed into law a bill to clarify the proper use

Commissioners and Resident Commissioners-elect.

For judicial decisions, prior to the enactment of Pub. L. No. 93–191, relating to the area within which a Member of Congress could send such franked mail, see *Hoellen* v *Annunzio*, 468 F2d 522 (7th Cir. 1972), cert. denied, 412 U.S. 953 (1973); *Rising* v *Brown*, 313 F Supp 824 (D.C. Calif. 1970).

19. Under 44 USC § 733, the Public Printer furnishes printed blank franks for mailing of public documents, and prints on official envelopes the Member's name, date, and topic, not to exceed 12 words.

Under 44 USC § 907, the Public Printer furnishes Members with envelopes for mailing the *Congressional Record* or parts thereof.

of the franking privilege, restricting judicial review of franking practices, and creating an advisory and investigatory commission on the use of the frank.

Public Law No. 93–191 (87 Stat. 737), originally reported as H. R. 3180 by the Committee on Post Office and Civil Service, amended title 39 of the United States Code to clarify the proper use of the franking privilege by Members of Congress, and established a special commission of the House of Representatives entitled the "House Commission on Congressional Mailing Standards."

The law amended title 39, section 3210 to define the scope of permissible use of the frank in assisting and expediting the conduct of the "official business, activities, and duties of the Congress of the United States."[20] The commission provides guidance to Members, promulgates regulations, and renders decisions on the use of the frank. Under the controlling statute, the jurisdiction of courts to inquire into the permissible use of the frank is limited.

Postal Service Interpretation and Enforcement

§ 7.2 Beginning in 1968, the Post Office Department and its successor, the U.S. Postal Service, discontinued the interpretation and enforcement of statutes regulating the franking privilege.

On Dec. 26, 1968, the General Counsel of the Post Office Department issued a memorandum[1] to Congress stating that the department would no longer interpret the laws on the use of the congressional frank,[2] and would no longer attempt to enforce the statutes and regulations by requesting payment of postage for material allegedly improperly franked.[3] The memorandum also

20. Prior to the enactment of Pub. L. No. 93–191, a variety of federal court decisions inquired into the permissible use of the franking privilege and limited the scope of "official business" in relation to the use of the frank. See, for example, *Hoellen* v *Annunzio,* 468 F2(522 (1972), cert. denied, 412 U.S. 953 (1973); *Schiaffo* v *Helstoski,* 350 F Supp 1076 (1972), rev'd 492 F2d 413 (1974).

1. Reprinted in "Law and Regulations Regarding Use of the Congressional Frank," Subcommittee on Postal Service of the Committee on Post Office and Civil Service, Committee print No. 14, 92d Cong. 1st Sess., p. 1 (1971).

2. For an example of Post Office Department interpretations issued prior to 1968, see "The Congressional Franking Privilege," publication No. 126, Post Office Department (Apr. 1968).

3. See publication No. 126, *id.* at p. 1. According to a Comptroller General

stated that the department would continue to tender to individual Members, on their request, advisory opinions on particular material sought to be franked.

After the Post Office Department was converted in 1971 to an independent U.S. Postal Service,[4] the General Counsel of the Postal Service informed the Chairman of the House Committee on Post Office and Civil Service that the new service would not only refrain from enforcement of statutes and regulations on the congressional frank, but would also cease rendering advisory opinions.[5]

Franking "Patron" Mail

§ 7.3 Where a Senate amendment to a legislative appropriation act prohibited the sending of "patron" mail under the frank of any Member of Congress,[6] the House concurred in the Senate amendment with an amendment prohibiting such mail under a Senator's frank but permitting a House Member to use his frank for mail addressed to patrons within his own congressional district.

On Dec. 17, 1963,[7] the House was considering a Senate amendment to a legislative appropriation bill which prohibited the use of the franking privilege by any Member of Congress for delivery of mailings to postal patrons ("occupant" mail). The House amended the Senate amendment by prohibiting that use of the franking privilege by Senators but not for Members of the House. The amendment limited such mailings to the Representative's immediate congressional district.

The Senate agreed to the amendment on the following day,

decision, No. B128938, Aug. 16, 1956, the Post Office Department had authority to collect postage which should have been paid on material not properly franked.

4. See the Postal Reorganization Act, Pub. L. No. 91–375, 84 Stat. 719, Aug. 2, 1970 (effective July 1, 1971).

5. Letter of Mr. David Nelson to Chairman Thaddeus Dulski (N.Y.) Aug. 12, 1971, reprinted in "Law and Regulations Regarding Use of the Frank," Subcommittee on Postal Service, Committee on Post Office and Civil Service, Committee print No. 14, 921 Cong. 1st Sess., p. 6 (1971).

6. "Patron" mail is mail identified with the Member's frank, with neither a name or address but marked "occupant" or "patron," and distributed by postal carriers to every postal patron on an established route. See the testimony of Postmaster General Day, Hearings Before a Subcommittee of the Committee on Appropriations, U.S. Senate, 88th Cong. 1st Sess., p. 256 (1963).

7. 109 CONG. REC. 24831, 24832, 88th Cong. 1st Sess.

and the provision became permanent law.(8)

Franking and the Congressional Record

§ 7.4 The Solicitor General informed a Member of Congress that the franking privilege extended to any material printed in the Congressional Record.(9)

On Jan. 28, 1944,(10) there was inserted in the Record a letter from the Solicitor General of the Post Office Department stating that all material in the *Congressional Record*, regardless of the place of printing or the style of type, could be sent out under the franking privilege. The latter added that extracts from the *Congressional Record* should bear identifying marks to clearly demonstrate that they appeared in the *Congressional Record*.

Abuse of Frank as Question of Privilege

§ 7.5 Public charges of misuse of the franking privilege give rise to a question of personal privilege.

On Jan. 28, 1944,(11) Speaker pro tempore John W. McCormack, of Massachusetts, ruled that a

8. 109 CONG. REC. 25025, 25026, 88th Cong. 1st Sess.

In the two preceding fiscal years, the Senate and House had disagreed over the inclusion of patron mail within the franking privilege (see Pub. L. No. 87–332, 75 Stat. 747, Sept. 30, 1961 and Pub. L. No. 87–730, 76 Stat. 694, Oct. 2, 1962). A Senate report (S. REPT. NO. 88–313), 88th Cong. 1st Sess. explained in part the 1963 compromise as follows at p. 6: "While in the past the [Appropriations] Committee has voted to bar the use of the simplified and occupant mailing privileges to all Members of Congress and has not changed its opinion, it is believed in the interest of comity and understanding that the committee should make the prohibition applicable solely to the U.S. Senate." The report added: "The Constitution provides that each House may determine the rules of its proceedings. While the mailing privilege does not specifically come under the rules of either body, in view of the past history of this legislation the committee believes each House should make its own determination in this regard."

9. See 39 USC § 3212, as amended by Pub. L. No. 93–191, 87 Stat. 741, which allows the sending of the Record, or any part thereof, or speeches or reports contained therein. See also *Straus* v *Gilbert*, 193 F Supp 214 (S.D.N.Y. 1968) (under 39 USC § 3212, Congressmen could send as franked mail, within and without his congressional district, material reprinted from the *Congressional Record*, even if mailed for election campaign purposes) .

10. 90 CONG. REC. 879, 880, 78th Cong. 2d Sess.

11. 90 CONG. REC. 879, 78th Cong. 2d Sess.

question of personal privilege had been stated when a Member presented a newspaper article quoting a book containing an accusation that a Member permitted the use of his frank by one of questionable character.[12]

§ 8. Office and Personnel Allowances; Supplies

Congress has established a variety of allowances and allotments which enable Members to equip, staff, and operate offices, both in the Capitol and in the home district.[13] Some allotments are furnished in kind with no dollar limit, such as office space in federal buildings.[14] Other allotments are limited to a certain dollar value, such as postage stamps[15] and electrical office equipment furnished to Members.[16] Other expenses of Members are reimbursed by the House up to a certain limit, such as telephone service[17] and home district office space in nonfederal buildings.[18] Another method of financing prevails over clerk-hire, which is paid directly by the House of Representatives to employees of the Member.[19] If an allowance may be withdrawn in cash as needed, as may the stationery allowance,[20] the allowance is taxable income to the Member.[1]

All office allowances are drawn from the contingent fund of the House.[2] Measures and regulations relating to such expenditures, and to the clerk-hire and office space of Members, are within the jurisdiction of the Committee

12. 39 USC § 3215, enacted into law by Pub. L. No. 91–375, 84 Stat. 754, Aug. 12, 1970, prohibits a Member from lending or permitting another to use his frank.

13. The allowances and allotments discussed in this section apply to the Delegates from the District of Columbia, Guam, and the Virgin Islands and to the Resident Commissioner from Puerto Rico, unless otherwise indicated.

14. See 40 USC §§ 177–184 (House office buildings) and 2 USC § 122 (home district office buildings).

15. See 2 USC § 42c.

16. See 2 USC § 112e. The Committee on House Administration may prescribe the dollar value limit of mechanical office equipment.

17. See 2 USC §§ 46g and 46g–1.

18. See 2 USC § 122 and § 8.6, infra (power of Committee on House Administration to adjust the home district office allotment).

19. See 2 USC § 92.

20. See 2 USC § 46b.

1. The Revenue Act of 1951, 65 Stat. 452, § 619(d), Oct. 20, 1951, which became effective Jan. 3, 1953, rendered cash allowances of Members accountable as taxable income.

2. See 2 USC § 57(b).

on House Administration.[3] Under the former practice, increases in the allowances of Members were brought before the House for its approval by resolution.[4] In the 92d Congress, however, the Committee on House Administration was authorized by law to independently adjust the allowances of House Members.[5] Any payment from the contingent fund must have the prior sanction of the committee.[6]

Each Member receives, by statute, an allotment of office space both at the Capitol and in the home district. An office in one of the House buildings is granted to the Member, based on a system of seniority and drawing lots.[7] In the home district, the Representative is entitled to three locations for office space, to be located in federal buildings if space is available.[8]

The offices of Representatives in the House office buildings are furnished by the House. In addition, each Member is entitled to electric office equipment, to be credited against his allowance for that purpose.[9] Electric equipment remains the property of the Clerk of the House during the period of its use.[10]

The most substantial allowance given to Members is the clerk-hire allowance, through which he staffs all his offices.[11] The max-

3. See § 8.1, infra.

For regulations promulgated by the Committee on House Administration, see Regulations of Travel and other Expenses of Committees and Members, Committee on House Administration, 92d Cong. (Mar. 1, 1971).

4. See, for example, § 8.8, infra.

5. See § 8.3, infra, including note as to later rescission of authority.

6. 2 USC § 95.

7. See 40 USC §§ 177–184. For information on the allotment of space in House office buildings, see Ch. 4, supra.

8. See § 8.6, infra, for adjustments made in the 92d Congress to the allowance for home district office space.

The Committee on House Administration has jurisdiction over all matters relating to office space for Members. *House Rules and Manual* § 693 (1973).

9. The Committee on House Administration has authority to sanction the purchase of electric and mechanical office equipment for Members, to prescribe the type of equipment, and to issue regulations as to the use, maximum dollar limit, and depreciation of such property. 2 USC § 112e.

10. See 2 USC § 122e(b).

11. See 2 USC § 332. For the disbursement of clerk-hire appropriations, see 2 USC § 92.

The clerk-hire allowance for the Delegates from Guam and the Virgin Islands is 60 percent of that of Members (see 48 USC § 1715). The Resident Commissioner from Puerto Rico and the Delegate from the District of Columbia receive the same clerk-hire as Members.

imum allowance has been adjusted upwards in recent Congresses.(12)

Clerical help may be dismissed by a Member without cause,(13) and under Rule XLIII clause 8, a Member may not retain anyone from his clerk-hire allowance who does not perform duties commensurate with his compensation. In the event a Member dies, his clerical help may remain on the House payroll until the time a successor is elected.(14)

Each Member is allotted a certain number of official publications, such as the *Congressional Record*,(15) the *House Rules and Manual*,(16) and the United States Code.(17)

Necessary supplies are furnished a Member's office pursuant to statute. Each Representative receives postage stamps up to a certain dollar limit,(18) and may draw upon a stationery account.(19) For communications purposes, each Member is entitled to a certain number of "units" for long distance telephone calls, telegrams, and cables.(20) Units are calculated on the number of minutes, for telephone communications, and on the number of words, for telegram and cable communications.(1)

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12. See § 8.4, infra.

The maximum dollar limit for the clerk-hire allowance, formerly based on a base rate pay system, has since been changed to a gross annual rate pay system (see 2 USC § 331).

13. 2 USC § 92.

14. See 2 USC § 92b. Pending the election of a successor, such clerks perform duties under the supervision of the Clerk of the House.

15. 44 USC § 906.

16. See, for example, H. Res. 1170, 92d Cong. 2d Sess., Oct. 18, 1972 (printing and distribution of revised *House Rules and Manual*).

17. 2 USC § 54.

The Clerk of the House must distribute to Members copies of the Journal, copies of requested documents printed by order of the House, and lists of reports which federal departments must make to Congress. Rule III clauses 2, 3, *House Rules and Manual* §§ 640, 641 (1973).

18. See 2 USC § 42c.

19. The stationery allowance, codified in 2 USC § 46b, has been adjusted by the Committee on House Administration (see § 8.7, infra).

A Member or Delegate elected to serve a portion of a term receives a prorated stationery allowance (see 2 USC § 46b–2).

20. See 2 USC § 46g. A Member or Delegate elected for a portion of a term receives a proportional amount of units.

1. Each Member receives a quarterly allowance in reimbursement for telephone service incurred outside the District of Columbia (see 2 USC § 46g–1). The Delegate from the District of Columbia is not entitled to that allowance.

Various office services are performed by officers and employees of the House. Members may have documents folded or prepared for bulk mailing by the House Folding Room. The Clerk of the House maintains radio and television studios for Members to make transcriptions and films. The Government Printing Office binds documents for House Members. The stationery room prints, without charge, official stationery for Members.

Advisory assistance on office operation is available from the House Office of Placement and Office Management.[2]

Cross References

Allowances and supplies of officers, officials, and employees, see Ch. 6, supra.
Distribution of official publications, see Ch. 5, supra.
House facilities in general, see Ch. 4, supra.

Jurisdiction of Committee on House Administration

§ 8.1 The Committee on House Administration has jurisdiction over all measures relating to allowances and clerk-hire for Members, office space, and appropriations and payments from the contingent fund of the House.

The Committee on House Administration, created by the Legislative Reorganization Act of 1946,[3] has jurisdiction under the House rules,[4] over employment of persons by the House, including clerks for Members, assignment of office space, and appropriations and payments from the contingent fund for allowances of Members. Any payments from the contingent fund must have the sanction of the Committee on House Administration.[5] The committee regulates the purchase and use of electric office equipment for Members.[6]

In the 92d Congress, the committee was given plenary powers to periodically review and adjust the allowances of Members, without the requirement that the House consider and pass individual resolutions on the subject of allowances.[7]

§ 8.2 The Committee on House Administration announced a

2. See 2 USC § 416.

3. 60 Stat. 812, Jan. 2, 1947.

4. *House Rules and Manual* § 693 (1973).

5. 2 USC § 95.
The committee may report at any time on all matters of expenditure from the contingent fund. See 99 CONG. REC 10360, 83d Cong. 1st Sess., July 29, 1953; 100 CONG. REC. 2282, 83d Cong. 2d Sess., Feb. 25, 1954.

6. 2 USC § 112e.

7. See § 8.3, infra.

policy to discourage the temporary employment, by Members and by committees, of personnel for periods of less than a month.

On Oct. 19, 1966,[8] Wayne L. Hays, of Ohio, the Chairman of the Subcommittee on Accounts of the Committee on House Administration announced as follows:

> MR. HAYS: . . . Today the House Committee on Administration passed unanimously a motion ordering and directing the chairman to notify all Members that, as of the 15th of November, any employee put on a Member's payroll, or a committee payroll, shall not be put on for a period of less than 1 month, except that if the person put on does not work out, and they desire to terminate his employment in less than a month, he may not reappear on the Member's payroll for a period of 6 months.

Adjustments of Allowances

§ 8.3 The Committee on House Administration became authorized by law in the 92d Congress to periodically review and adjust the office and supplies allowances of Members.

On July 21, 1971, the House agreed to House Resolution 457,[9] later enacted into permanent law,[10] which empowered the Committee on House Administration to periodically review and adjust the allowances of Members of the House without requiring any action by the House. The resolution covered the following allowances: clerk-hire; postage stamps; stationery; telecommunications; official office space and official expenses in the district; official telephone service in the district; travel and mileage.

During debate on the resolution, it was stated by Mr. Frank Thompson, Jr., of New Jersey, a member of the committee, that any such action taken by the committee would be submitted to the House and printed in the *Congressional Record* on the day following a decision.[11]

The purpose of the resolution, as stated by Mr. Thompson, was to "eliminate the need for coming to the floor a number of times each session with privileged resolutions on . . . routine allowances."[12]

The resolution, called up as privileged by the Committee on

8. 112 CONG. REC. 27653, 89th Cong. 2d Sess.

9. 117 CONG. REC. 26451, 92d Cong. 1st Sess. But see 2 USC § 57a (authority substantially rescinded).

10. 2 USC § 57, enacted by Pub. L. No. 92–184, Ch. 4, 85 Stat. 636, Dec. 15, 1971.

11. 117 CONG. REC. 26446, 92d Cong. 1st Sess.

12. *Id.* at p. 26445

House Administration, read as follows:

Resolved, That (a) until otherwise provided by law, the Committee on House Administration may, as the committee considers appropriate, fix and adjust from time to time, by order of the committee, the amounts of allowances (including the terms, conditions, and other provisions pertaining to those allowances) within the following categories:

(1) for Members of the House of Representatives, the Resident Commissioner from Puerto Rico, and the Delegate from the District of Columbia—allowances for clerk hire, postage stamps, stationery, telephone and telegraph and other communications, official office space and official office expenses in the congressional district represented (including as applicable, a State, the Commonwealth of Puerto Rico, and the District of Columbia), official telephone services in the congressional district represented, and travel and mileage to and from the congressional district represented; and

(2) for the standing committees, the Speaker, the majority and minority leaders, the majority and minority whips, the Clerk, the Sergeant at Arms, the Doorkeeper, and the Postmaster of the House of Representatives—allowances for postage stamps, stationery, and telephone and telegraph and other communications.

(b) The contingent fund of the House of Representatives is made available to carry out the purposes of this resolution.

Clerk-hire Allowance

§ 8.4 The Committee on House Administration adjusted upwards the clerk-hire allowance of Members in the 92d and 93d Congresses.

On Feb. 29, 1972,[13] Frank Thompson, Jr., of New Jersey, the Chairman of the Subcommittee on Accounts, Committee on House Administration, inserted in the Record an order equalizing the number of clerks and clerk-hire allowance for Members:

Order No. 3 equalizes the number of clerks and the amount of clerk hire allowance to all Members of the House of Representatives, the Resident Commissioner from Puerto Rico, and the Delegate from the District of Columbia. The former method of allocating this allowance—based on the population of a Member's district—has become obsolete under the new redistricting plans being adopted throughout the United States. Under these plans, congressional districts will be of a more uniform size.

Order No. 3 follows:

Resolved, That effective March 1, 1972, until otherwise provided by order of the Committee on House Administration, each Member of the House of Representatives, the Resident Commissioner from Puerto Rico, and the Delegate from the District of Columbia shall be entitled to an annual clerk hire allowance of $157,092 for not to exceed 16 clerks. There shall be paid out of the contingent fund of the House of Representatives such sums as may be necessary to carry out this order until otherwise provided by law.

13. 118 CONG. REC. 6122, 92d Cong. 2d Sess.

The Committee on House Administration had ordered the adjustment pursuant to the authority granted to the committee by the House.(14)

On Apr. 18, 1973, Mr. Thompson inserted in the Record two orders further affecting the clerk-hire allowance of Members: (15)

COMMITTEE ORDER NO. 5

Resolved, That effective May 1, 1973, until otherwise provided by order of the Committee on House Administration, upon written request to the Committee on House Administration, a Member, the Resident Commissioner from Puerto Rico, or a Delegate to the House of Representatives may employ in lieu of 1 of the 16 clerks allowed under his clerk hire allowance, a research assistant at such salary as the Member may designate. The Member's annual clerk hire allowance will then be increased at the rate of $20,000.

There shall be paid out of the contingent fund of the House of Representatives such sums as may be necessary to carry out this order until otherwise provided by law.

COMMITTEE ORDER NO. 6

Resolved, That effective May 1, 1973, until otherwise provided by order of the Committee on House Administration, upon written request to the Committee on House Administration, a Member, the Resident Commissioner from Puerto Rico or a Delegate to the House of Representatives may allocate up to $250 a month of any unused portion of his clerk hire allowance for the leasing of equipment necessary for the conduct of his office.

There shall be paid out of the contingent fund of the House of Representatives such sums as may be necessary to carry out this order until otherwise provided by law.(16)

§ 8.5 A resolution providing a minimum gross annual salary for all employees paid from clerk-hire allowances was not called up as privileged, since it did not involve the contingent fund but a separate clerk-hire appropriation.

On Feb. 3, 1971, Wayne L. Hays, of Ohio, Chairman of the Committee on House Administration, called up by unanimous consent a resolution providing for a minimum gross annual salary for all clerk-hire employees.(17) The resolution was considered by

14. See § 8.3, supra.

The former base rate pay system on which clerk-hire was calculated was converted to a gross per annum salary system by the Legislative Reorganization Act of 1970, Pub. L. No. 91–510, 84 Stat. 1140, Oct. 26, 1970, codified in 2 USC 331.

15. 119 CONG. REC. 13074, 93d Cong. 1st Sess.

16. Pursuant to H. Res. 420, 93d Cong. 1st Sess., Sept. 18, 1973, each Member may also employ a "Lyndon Baines Johnson Congressional Intern," for a maximum of two months, at not to exceed $500 per month.

17. 117 CONG. REC. 1517, 1518, 92d Cong. 1st Sess.

unanimous consent, since such a resolution, calling for expenditure not from the contingent fund but from the separate clerk-hire appropriation, is not privileged under Rule XI clause 22:

H. RES. 189

Resolved, That, until otherwise provided by law and notwithstanding any other authority to the contrary, effective at the beginning of the first pay period commencing on or after the date of adoption of this resolution no person shall be paid from the clerk hire allowance of any Member of the House of Representatives, the Resident Commissioner from Puerto Rico, or the Delegate from the District of Columbia at a per annum gross rate of less than $1,200.

Home Office Allowance

§ 8.6 The Committee on House Administration modified the home district office space allowance of Members in the 92d Congress.

On Aug. 4, 1971,[18] the Chairman of the Committee on House Administration inserted in the Record an order by that committee adjusting the allowance of Members for home district office space:

(Mr. Hays asked and was given permission to extend his remarks at this point in the Record and to include extraneous matter.)

MR. [WAYNE L.] HAYS [of Ohio]: Mr. Speaker, House Resolution 457, adopted by the House of Representatives on July 21, 1971, provided the Committee on House Administration the authority to fix and adjust from time to time various allowances by order of the committee. During House debate on House Resolution 457, the Members were assured that any order adopted by the committee under the authority of the resolution would be published in the Congressional Record in the first issue following the committee action. Pursuant to that commitment, the following order of the Committee on House Administration is submitted for printing in the Congressional Record. After careful consideration, the order was approved unanimously by the Subcommittee on Accounts on July 29, 1971, and adopted unanimously by the Committee on House Administration August 4, 1971.

TO ADJUST THE ALLOWANCE FOR RENTAL OF DISTRICT OFFICES

Resolved, That effective August 1, 1971, until otherwise provided by order of the Committee on House Administration, each Member of the House of Representatives shall be entitled to office space suitable for his use in the district he represents at not more than three places designated by him in such district. The Sergeant at Arms shall secure office space satisfactory to the Member in post offices or Federal buildings at not more than two locations if such space is available. Office space to which a Member is entitled under this resolution which is not secured by the Sergeant at Arms may be secured by the Member, and the Clerk shall approve for payment from the

18. 117 CONG. REC. 29526, 92d Cong. 1st Sess.

contingent fund of the House of Representatives vouchers covering bona fide statements of amounts due for such office space not exceeding a total allowance to each Member of $200 per month; but if a Member certifies to the Committee on House Administration that he is unable to obtain suitable space in his district for $200 per month due to high rental rates or other factors, the Committee on House Administration may, as the Committee considers appropriate, direct the Clerk to approve for payment from the contingent fund of the House of Representatives vouchers covering bona fide statements of amounts due for suitable office space not exceeding a total allowance to each Member of $350 per month. No Member shall be entitled to have more than two district offices outfitted with office equipment, carpeting and draperies at the expense of the General Services Administration.

As used in this resolution the term "Member" means any Member of the House of Representatives, the Resident Commissioner of Puerto Rico and the Delegate of the District of Columbia.[19]

Another adjustment affecting the allowance was announced on Feb. 29, 1972:[20]

MR. [FRANK] THOMPSON [Jr.] of New Jersey: Mr. Speaker, House Resolution 457, adopted by the House of Representatives on July 21, 1971, provided the Committee on House Administration the authority to fix and adjust from time to time various allowances by order of the committee. Pursuant to this authority, the committee has revised Order No. 1 and issued Order No. 3.

Order No. 1, revised, increases the number of allowable district offices in Federal office buildings from two to three. Some Members, because of the physical size of their districts require additional offices to adequately serve their constituents. This order gives those Members the authority to establish an additional office in a Federal building if such space is available.

Order No. 1, revised, follows:

Resolved, That effective January 25, 1972, each Member of the House of Representatives shall be entitled to office space suitable for his use in the district he represents at such places designated by him in such district. The Sergeant at Arms shall secure office space satisfactory to the Member in post offices or Federal buildings at not more than three (3) locations if such space is available. Office space to which a Member is entitled under this resolution which is not secured by the Sergeant at Arms may be secured by the Member, and the Clerk shall approve for payment from the contingent fund of the House of Representatives vouchers covering bona fide statements of amounts due for office space not exceeding a total allowance to each Member of $200 per month; but if a Member certifies to the Committee on House Administration that he is unable to obtain suitable space in his district for $200 per month due to high rental rates or other factors, the Committee on House Administration, may as the committee considers appropriate, direct the Clerk to approve for payment from the contingent fund of the House of Rep-

19. For the authority of the Committee on House Administration to adjust such allowances, see § 8.3, supra. For previous office space allowed under the United States Code, see 2 USC § 122.

20. 118 CONG. REC. 6122, 92d Cong. 2d Sess.

resentatives vouchers covering bona fide statements of amounts due for suitable office space not exceeding a total allowance to each Member of $350 per month. Members shall be entitled to have no more than three (3) district offices outfitted with office equipment, carpeting, and draperies at the expense of the General Services Administration.

As used in this resolution the term "Member" means any Member of the House of Representatives, the Resident Commissioner of Puerto Rico, and the Delegate of the District of Columbia.

Stationery Allowance

§ 8.7 The Committee on House Administration increased the stationery allowance of Members in the 92d Congress.

On Oct. 5, 1972,[1] the Committee on House Administration increased the stationery allowance of Members by Order No. 4, submitted pursuant to the authority granted the committee to adjust allowances:

COMMITTEE ON HOUSE ADMINISTRATION: ORDER NO. 4—TO ADJUST THE ALLOWANCE FOR STATIONERY FOR REPRESENTATIVES, DELEGATES, AND RESIDENT COMMISSIONER

Resolved, That effective January 3, 1973, until otherwise provided by order of the Committee on House Administration; the allowance for stationery for each Member of the House of Representatives, Delegates, and Resident Commissioner shall be $4,250 per regular session.[2]

Contingent Fund Appropriations as Privileged

§ 8.8 Resolutions which provided payment out of the contingent fund for additional office allowances of Members were called up as privileged.[3]

On May 26, 1966, a resolution from the Committee on House Administration providing payment from the contingent fund of sums to increase the basic clerk-hire allowance on each Member and the Resident Commissioner was called up as privileged:[4]

MR. [SAMUEL N.] FRIEDEL [of Maryland]: Mr. Speaker, by direction of the Committee on House Administration, I offer a privileged resolution (H. Res. 855) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

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1. 118 CONG. REC. 34177, 92d Cong. 2d Sess.

2. For the prior allowance, see 2 USC § 46b.

3. The power granted to the Committee on House Administration in the 92d Congress to independently adjust allowances had made unnecessary the practice of offering privileged resolutions for payment from the contingent fund of allowances (see § 8.3, supra).

4. 112 CONG. REC. 11654, 89th Cong. 2d Sess.

H. RES. 855

Resolved, That, effective on the first day of the first month which begins after the date of adoption of this resolution, there shall be paid out of the contingent fund of the House, until otherwise provided by law, such sums as may be necessary to increase the basic clerk hire allowance of each Member and the Resident Commissioner from Puerto Rico by an additional $7,500 per annum, and each such Member and Resident Commissioner shall be entitled to one clerk in addition to those to which he is otherwise entitled.

With the following committee amendment:

Line 7, strike out "$7,500" and insert "$7,000".

On Sept. 27, 1951,[5] the House considered a resolution called up by the Committee on House Administration:

MR. [THOMAS B.] STANLEY [of Virginia]: Mr. Speaker, by direction of the Committee on House Administration I offer a privileged resolution (H. Res. 318) with amendments, and ask for its immediate consideration.

The Clerk read as follows:

Resolved, That upon the request of any Member, officer, or committee of the House of Representatives and with the approval of the Committee on House Administration, the Clerk of the House of Representatives is authorized and directed to purchase electric office equipment for the use of such Member, officer, or committee. The cost of such equipment shall be paid from the contingent fund of the House of Representatives.

Sec. 2. The Committee on House Administration shall prescribe such standards and regulations (including regulations establishing the types and maximum amount of electric office equipment which may be furnished to any Member, officer, or committee) as may be necessary to carry out the provisions of this resolution.

Sec. 3. Electric office equipment furnished under this resolution shall be registered in the office of the Clerk of the House of Representatives, and shall remain the property of the House of Representatives.

Sec. 4. For the purposes of this resolution, the term "Member" includes the Representatives in Congress, the Delegates from the Territories of Alaska and Hawaii, and the Resident Commissioner from Puerto Rico. . . .

MR. [KARL M.] LECOMPTE [of Iowa]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER:[6] The gentleman will state it.

MR. LECOMPTE: Is this a privileged resolution?

THE SPEAKER: The Chair would hold that this is a privileged resolution because the expenditure is out of the contingent fund of the House.[7]

5. 97 CONG. REC. 12289, 82d Cong. 1st Sess.

6. Sam Rayburn (Tex.).

7. See also 116 CONG. REC. 39448, 39449, 91st Cong. 2d Sess., Dec. 2, 1970 (resolution for additional stationery allowance from contingent fund and resolution for increased telephone and telegraph allowance from contingent fund); 111 CONG. REC. 13799, 89th Cong. 1st Sess., June 16, 1965 (resolution authorizing employment by Members of student congressional interns, to be paid from contingent fund).

Legislation Amending Allowances

§ 8.9 A joint resolution to amend existing law by providing an increase in the number of electric typewriters furnished to each Member, to be paid for from the contingent fund, is not called up as privileged.[8]

On Sept. 15, 1965,[9] a joint resolution reported from the Committee on House Administration, increasing the number of electric typewriters to be furnished to Members by the Clerk of the House, and amending a prior joint resolution on the same subject, was not called up as privileged, since it amended existing law.

8. In the 92d Congress, the Committee on House Administration was given independent power to adjust allowances, thereby obviating the necessity of offering resolutions to increase allowances (see § 8.3, supra).

9. 111 CONG. REC. 23985, 89th Cong. 1st Sess.

§ 8.10 Amendments to increase the clerk-hire allowance and to permit Members to adjust clerk-hire are legislation and not in order on pending appropriations bills.

On Dec. 6, 1944,[10] Chairman Herbert C. Bonner, of North Carolina, ruled that an amendment fixing new rates of clerk-hire for Members and new rates of salaries for committee employees, and allowing Members to readjust those salaries, was legislation and was not in order on a pending appropriation bill.

On July 1, 1955,[11] Chairman William M. Colmer, of Mississippi, held an amendment increasing the basic rate of allowance for clerk-hire to be legislation and not in order on an appropriations bill.

10. 90 CONG. REC. 8937–39, 78th Cong. 2d Sess.

11. 101 CONG. REC. 9815, 9816, 84th Cong. 1st Sess.

C. QUALIFICATIONS AND DISQUALIFICATIONS

§ 9. In General; House as Judge of Qualifications

The Constitution requires three standing qualifications of Members,[12] mandates that they swear to an oath to uphold the Constitution,[13] and prohibits them from holding incompatible offices.[14] The House is constituted the sole judge of the qualifications and disqualifications of its Members.[15]

Alleged failure to meet qualifications is raised, usually by another Member-elect, before the House rises *en masse* to take the oath of office.[16] If a challenge is made, the Speaker requests the challenged Member-elect to stand aside. The Member-elect whose qualifications are in doubt may then be authorized to take the oath of office pursuant to a resolution so providing, which resolution may either declare him entitled to the seat, or refer the question of his final right to committee.[17] The House may also refuse to permit him to take the oath, and may refer the question of his qualifications and his right to take the oath to committee.[18]

If the House finds that a Member-elect has not met the quali-

12. Art. I, § 2, clause 2.

13. Art. VI, clause 3.

14. Art. I, § 6, clause 2.

15. Art. I, § 5, clause 1. See *Sevilla* v *Elizalde,* 112 F2d 29, 38 (D.C. Cir. 1940) (determination of qualifications solely for legislature); *Application of James,* 241 F Supp 858, 860 (D.N.Y. 1965) (no jurisdiction in federal courts to pass on qualifications and legality of Representative); *Keogh* v *Horner,* 8 F Supp 933, 935 (D.Ill. 1934) (supreme power of Congress over qualifications and legality of elections). Compare *Powell* v *McCormack,* 395 U.S. 486 (1969) for limitations on the power of the House to exclude a Member for qualifications not specified in the Constitution (see Ch. 12, infra).

16. See § 9.1, infra.

17. Under the House rules, the Committee on House Administration, which assumed the functions of the former Committee on the Election of President, Vice President, and Representatives in Congress, has jurisdiction over the qualifications of Members. *House Rules and Manual* §§ 693, 694 (1973).

18. For an instance where the taking of oath was deferred for Members-elect whose qualifications were challenged, see § 9.2, infra.

The temporary deprivation to a state of its equal representation in Congress when a Member-elect is refused immediate or final right to a seat is a necessary consequence of Congress' exercise of its constitutional power to judge the qualifications, returns, and elections of its Members. *Barry* v *ex rel. Cunningham,* 279 U.S. 615 (1929).

fications for membership, or has failed to remove disqualifications, a new election must be held. An opposing candidate with the next highest number of votes cannot claim the right to the seat.(19)

Congress and the courts have uniformly rejected the idea that the individual states could require qualifications for Representatives above and beyond those enumerated in the Constitution.(20) The

19. See 6 Cannon's Precedents §§ 58, 59; 1 Hinds' Precedents §§ 323, 326, 450, 463, 469.

20. For the congressional determination that states lack power over the qualifications of Representatives, see 1 Hinds' Precedents §§ 414–416, 632.

See also, for lack of state power to add or determine qualifications, *Richardson* v *Hare,* 381 Mich. 304, 160 N.W. 2d 883 (1968) and *Danielson* v *Fitzsimons,* 232 Minn. 149, 44 N.W. 2d 484 (1950).

Where a state court denied a candidate's eligibility for a congressional seat, and a federal court had affirmed the eligibility of another candidate identically situated, Supreme Court Justice Black, sitting in Chambers, granted interim relief. See *Florida ex rel. Davis* v *Adams,* 238 So. 2d 415 (Flat 1970), stay granted, 400 U.S. 1203 (1970) and *Stack* v *Adams,* 315 F Supp 1295 (N.D. Fla. 1970).

State attempts to require a candidate to be a resident of the district where he sought a congressional seat have been invalidated. *Exon* v *Tiemann,* 279 F Supp 609 (Neb. 1968); *State ex rel. Chavez* v *Evans,* 79 N.M. 578, 446 P.2d 445 (1968); *Hellman* v *Collier,* 217 Md. 93, 141 A.2d 908 (1958).

Where a candidate's affidavit stated he met all qualifications, whether or not he was a "sojourner" was for Congress and not for the courts to decide. *Chavez* v *Evans,* 79 N.M. 578, 446 P.2d 445 (1968).

Similarly, states cannot render ineligible for congressional seats incumbents of state elective offices, *State ex rel. Pickrell,* 92 Ariz. 243, 375 P.2d 728 (1962), or state governors, *State ex rel. Johnson* v *Crane,* 197 P.2d 864 (Wyo. 1948), or state judges, *Ekwell* v *Stadelman,* 146 Or. 439, 30 P.2d 1037 (1934), *Stockland* v *McFarland,* 56 Ariz. 138, 106 P.2d 328 (1940).

States cannot add qualifications requiring affirmations of loyalty, such as requiring affidavits showing lack of intent to overthrow the government, *Shub* v *Simpson,* 76 A.2d 332 (Md. 1950), appeal dism'd, 340 U.S. 881 (1950); nor can they bar a candidate for openly espousing international communism and leading the American Communist Party. *In re O'Connor,* 17 N.Y.S.2d 758, 173 Misc. 419 (1940).

The states have attempted to regulate primaries in such a manner as to set qualifications for election to a federal office. However, a state cannot independently render a losing candidate in a primary ineligible for election. See *State ex rel. Sundfor* v *Thorson,* 72 N.D. 246, 6 N.W. 2d 89 (1942).

In general, any special or unusual conditions mandated by a state act

states have regulatory powers over federal elections, but they may not determine the qualifications for election to the office.(1) Likewise, the qualifications and disqualifications of Delegates and Resident Commissioners are specified and judged under the sole jurisdiction of Congress itself.(2)

One important issue relating to the qualifications and disqualifications of Members remains unresolved in part, although clarified by the Supreme Court in 1969. That question concerns the power of the House to exclude Members-elect for other than failure to meet the express constitutional qualifications, and the right of the House to add requirements in the nature of qualifications.(3) In the case of *Powell* v *McCormack*,(4) the Supreme Court held that the qualifications of age, citizenship, and state inhabitancy were exclusive and that the House could not exclude a Member-elect for allegedly improper conduct while a Member of past Congresses.(5)

The court based its decision on the historical developments in the

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to regulate federal elections are invalid, insofar as they directly or indirectly add to qualifications. *State* v *Russell*, 10 Ohio S. & C.P. Dec. 225 (1900).

1. Where state statutes have purported only to regulate elections, and not to set qualifications, they have been permitted. Thus, an Illinois statute requiring petitions signed by a certain number of voters, from a certain number of counties, did not violate the exclusiveness of constitutional qualifications. *MacDougall* v *Green*, 335 U.S. 281 (1948).

A state may require a five percent filing fee of a candidate without adding to qualifications. *Fowler* v *Adams*, 315 F Supp 592 (Flat 1970), stay granted, 400 U.S. 1205 (J. Black in Chambers) (1970), appeal dism'd, 400 U.S. 986 (1970); but see *Dillon* v *Fiorina*, 340 F Supp 729 (N.M. 1972), where a six percent filing fee for a Senatorial candidate was ruled unconstitutional.

A state has the power to require each candidate to appoint a campaign treasurer. *State* v *McGucken*, 244 Md. 70. 222 A.2d 693 (1966).

2. See § 3, supra, for the qualifications of Delegates and Resident Commissioners and for the method of determining those qualifications.

3. For lengthy historical debate on the power of Congress to add qualifications, see 1 Hinds' Precedents §§ 414, 415, 443, 449, 451, 457, 458, 469, 478, 481, 484. For more recent debate on the subject, relating to the attempt to exclude Member-elect Adam Clayton Powell from Congress, see §§ 9.3, 9.4, infra.

For debate in the Senate on the power of Congress to add qualifications, see §§ 9.5, 9.6, infra. See also Hupman, Senate Election, Expulsion and Censure Cases from 1789 to 1972, S. Doc. No. 92–7, 92d Cong. 1st Sess. (1972).

4. 395 U.S. 486 (1969).

5. See 395 U.S. 486, 489–493.

original Constitutional Convention and the intent of the framers of the Constitution to prescribe exclusive qualifications and to limit the House to judging the presence or absence of those standing requirements.(6) The decision apparently precludes the practice of the House or Senate, followed on numerous occasions during the 19th and 20th centuries, of excluding Members-elect for prior criminal, immoral, or disloyal conduct.(7) The court upheld in *Powell* the interest of state voters in being represented by the person of their choice, regardless of congressional dislike for the Member's-elect moral, political, or religious activities.(8)

The *Powell* case did not discuss, however, other constitutional provisions which may give rise to disqualifications, such as the requirement to swear to an oath and the requirement of loyalty after once

6. 395 U.S. 486, 518–547. The court drew upon the practice of the English and colonial parliaments, the debates of the Constitutional Convention, the debates of the ratifying conventions, and Hamilton and Madison's comments in the Federalist Papers (see, in particular, Federalist No. 60).

7. For exclusions by the House, see 1 Hinds' Precedents § 449 (1868, Civil War disloyalty); § 451 (1862, Civil War disloyalty); § 459 (1868, Civil War disloyalty); § 620 (1869, Civil War disloyalty); § 464 (1870, "infamous character", selling appointments to West Point); § 473 (1882, practice of polygamy by Delegate-elect); §§ 474–480 (1900, practice and conviction of polygamy); 6 Cannon's Precedents §§ 56–59 (1919, acts of disloyalty constituting criminal conduct).

The Senate has excluded one Senator-elect for disloyalty (see 1 Hinds' Precedents § 457 [1867]), but seated a Senator-elect accused of polygamy (see 1 Hinds' Precedents § 483 [1907]). For the two attempts in the Senate since 1936 to exclude Senators-elect for failure to meet other than the constitutional qualifications, see § 9.5, infra (failure to muster two-thirds majority) and § 9.6, infra (Senator-elect died while case pending).

In another instance, a Senator whose character qualifications were challenged by petition was held entitled to his seat without discussion in the Senate (see 81 CONG. REC. 5633, 75th Cong. 1st Sess., June 14, 1937).

8. 395 U.S. 486, 547–548. As noted in the United States Constitution Annotated, Library of Congress, S. DOC. No. 92–82, 92d Cong. 2d Sess. (1972), the reasoning of the court in Powell may be analogized to other cases holding that voters have the right to cast a ballot for the person of their choice and the right to have their ballot counted at undiluted strength. See *Ex parte Yarborough,* 110 U.S. 651 (1884); *United States* v *Classic,* 313 U.S. 299 (1941); *Wesberry* v *Sanders,* 376 U.S. 1 (1964); *Williams* v *Rhodes,* 393 U.S. 23 (1969).

having taken an oath.[9] The constitutional prohibition against holding incompatible offices may disqualify a Member or Member-elect,[10] and a person impeached by Congress may be disqualified from again holding an office of honor, trust, or profit under the United States.[11]

Cross References

Challenging the right to be sworn, see Ch. 2, supra.

Punishment, censure, or expulsion, see Ch. 12, infra.

House as judge of elections, see Ch. 9, infra.

Procedure in challenging qualifications before rules adoption, see Chs. 1 and 2, supra.

Collateral References

Curtis, Power of the House of Representatives to Judge the Qualifications of Its Members, 45 Tex. L. Rev. 1199 and 1205 (1967).

Dempsey, Control by Congress Over the Seating and Disciplining of Members, Ph. D. Dissertation, Univ. of Michigan (1956) (on file with Library of Congress).

Dionisopoulos, A Commentary on the Constitutional Issues in the Powell and Related Cases, 17 Jour. Pub. Law 103 (1968).

Federalist No. 60 (Hamilton), Modern Library (1937).

House Rules and Manual §§ 46–51 (comment to U.S. Const. art. I, § 5, clause 1) (1973).

House Rules and Manual §§ 9–13 (comment to U.S. Const. art. I, § 2, clause 2) (1973).

House Rules and Manual § 35 (1973) (comment to U.S. Const. art. I, § 3, clause 3, Senate qualifications).

McGuire, The Right of the Senate to Exclude or Expel a Senator, 15 Georgetown L. Rev. 382 (1927).

Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673 (1968).

Schwartz, *A Commentary on the Constitution of the United States*, p. 97, McMillan Co. (N.Y. 1963).

Story, *Commentaries on the Constitution of the United States*, §§ 616–624, Da Capo Press (N.Y. republication 1970).

United States Constitution Annotated, Library of Congress, S. DOC. NO. 92–82, 92d Cong. 2d Sess. (1972).

Weeks, Adam Clayton Powell and the Supreme Court, Univ. Press of Cambridge, Mass. (Boston 1971).

Wickersham, The Right of the Senate to Determine the Qualifications of Its Members, S. DOC. NO. 4, 70th Cong. 1st Sess. (1927), reprinted at 88 CONG. REC. 3047–50, 77th Cong. 2d Sess.

9. These issues are analyzed in § 12, infra. Unwillingness or lack of mental capacity to take the oath could conceivably act as disqualifications.

10. See § 13 (incompatible offices) and § 14 (military service), infra.

11. U.S. Const. art. I, § 3, clause 7.

Challenging Procedure

§ 9.1 Challenges by one Member-elect to the qualifications of another are usually presented prior to the swearing in of Members-elect en

masse, whereupon the Speaker requests the challenged Member-elect to stand aside.

On Jan. 10, 1967, Member-elect Lionel Van Deerlin, of California, stated a challenge to the right of Member-elect Adam C. Powell, of New York, to be sworn, based on charges allegedly disqualifying him to be a Member of the House. The Speaker requested Mr. Powell to stand aside while the oath was administered to the other Members-elect: (12)

THE SPEAKER: (13) According to the precedent, the Chair will swear in all Members of the House at this time.

If the Members will rise, the Chair will now administer the oath of office.

OBJECTION TO ADMINISTRATION OF OATH

MR. VAN DEERLIN: Mr. Speaker.

THE SPEAKER: For what purpose does the gentleman from California rise?

MR. VAN DEERLIN: Mr. Speaker, upon my responsibility as a Member-elect of the 90th Congress, I object to the oath being administered at this time to the gentleman from New York [Mr. Powell]. I base this upon facts and statements which I consider reliable. I intend at the proper time to offer a resolution providing that the question of eligibility of Mr. Powell to a seat in this House be referred to a special committee——

THE SPEAKER: Does the gentleman demand that the gentleman from New York step aside?

MR. VAN DEERLIN: Yes, Mr. Speaker.

THE SPEAKER: The gentleman has performed his duties and has taken the action he desires to take under the rule. The gentleman from New York [Mr. Powell] will be requested to be seated during the further proceedings.

Challenge to Qualifications by Citizen

§ 9.2 A challenge to the qualifications of a Representative-elect may be instituted by the filing of a memorial or petition by a citizen.

On Mar. 11, 1933,(14) Speaker Henry T. Rainey, of Illinois, laid before the House a letter from the Clerk transmitting a memorial and accompanying letters challenging the citizenship qualifications of Henry Ellenbogen, Representative-elect from Pennsylvania.

Mr. Ellenbogen did not take the oath until Jan. 3, 1934, and was not declared entitled to his seat until the adoption of a resolution to that effect on June 15, 1934.(15)

12. 113 CONG. REC. 14, 90th Cong. 1st Sess. For the Senate practice, see §§ 9.5, 9.6, infra.

13. John W. McCormack (Mass.).

14. 77 CONG. REC. 239, 73d Cong. 1st Sess.

15. 78 CONG. REC. 12193, 73d Cong. 2d Sess. See § 10.1, infra, for further

Power of House to Determine Qualifications

§ 9.3 The House decided in the 90th Congress that it could exclude, by a majority vote, a duly qualified and certified Member-elect for improper conduct while a former Member of the House.(16)

On Jan. 10, 1967, the convening day of the 90th Congress, a challenge was made to the right to be sworn of Mr. Adam C. Powell, of New York, whose credentials had been submitted to the House, and whose qualifications of age, citizenship, and inhabitancy had been satisfied. He stepped aside as the oath was administered to the other Members-elect *en masse*.(17) The challenge to Mr. Powell's right to a seat was based on his alleged misconduct in a prior Congress as a Member of the House and Chairman of a committee, and on his avoidance of state court processes.

House Resolution No. 1 was then offered, which would have permitted Mr. Powell to take the oath but referred the question of his final right to a seat to a special committee. The House rejected the previous question on House Resolution No. 1 and adopted a substitute amendment referring both Mr. Powell's right to be sworn and his final right to

discussion of Mr. Ellenbogen's qualifications for a seat.

For instances of petitions submitted to the Senate by private citizens, challenging the qualifications of Senators-elect, see 81 CONG. REC. 5633, 75th Cong. 1st Sess., June 14, 1937; 88 CONG. REC. 2077, 2078, 77th Cong. 2d Sess., Mar. 9, 1942; and 93 CONG. REC. 91–93, 80th Cong. 1st Sess., Jan. 4, 1947.

16. The action of the House in excluding the Member-elect was ruled unconstitutional by the Supreme Court in *Powell* v *McCormack,* 395 U.S. 486 (1969).

For the contrary views of two Members of Congress on the power of the House to exclude Mr. Powell, see Curtis, Power of the House of Representatives to Judge the Qualifications of Its Members, 45 Tex. L. Rev. 1199 (1967) and Eckhardt, The Adam Clayton Powell Case, 45 Tex. L. Rev. 1205 (1967).

For a prior instance (1919) where a Member-elect with unquestioned credentials was denied a seat for other than failure to meet the requirements of age, citizenship, or inhabitancy, see 6 Cannon's Precedents §§ 56–58.

17. 113 CONG. REC. 14, 90th Cong. 1st Sess.

Although some Members challenged the fulfillment by Mr. Powell of the inhabitancy qualification, that ground for exclusion was not considered by the House or the special committee established to investigate his right to a seat. See 113 CONG. REC. 4772, 90th Cong. 1st Sess., Feb. 28, 1967, and the resolution offered on Mar. 1, 1967, 113 CONG. REC. 4993, 90th Cong. 1st Sess.

be seated to a special committee: (18)

MR. GERALD R. FORD [of Michigan]: Mr. Speaker, I offer a substitute for House Resolution 1.

The Clerk read as follows:

Amendment offered by Mr. Gerald R. Ford as a substitute for House Resolution 1: Strike out all after the resolving clause and insert the following:

"*Resolved*, That the question of the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House to be appointed by the Speaker, four of whom shall be Members of the minority party appointed after consultation with the minority leader. Until such committee shall report upon and the House shall decide such question and right, the said Adam Clayton Powell shall not be sworn in or permitted to occupy a seat in this House.

"For the purpose of carrying out this resolution the committee, or any subcommittee thereof authorized by the committee to hold hearings, is authorized to sit and act during the present Congress at such times and places within the United States, including any Commonwealth or possession thereof, or elsewhere, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee nor any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpoenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

"Until such question and right have been decided, the said Adam Clayton Powell shall be entitled to all the pay, allowances, and emoluments authorized for Members of the House.

"The committee shall report to the House within five weeks after the members of the committee are appointed the results of its investigation and study, together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House."

On Mar. 1, 1967, the special committee on the right of Mr. Powell to his seat offered House Resolution No. 278, which declared Mr. Powell entitled to his seat on the ground that he met all constitutional qualifications for membership, but which imposed various penalties for congressional misconduct: (19)

MR. [EMANUEL] CELLER [of New York]: Mr. Speaker, pursuant to House Resolution 1, I call up for immediate consideration the following privileged resolution, House Resolution 278, which is at the Clerk's desk.

The Clerk read the resolution, as follows:

18. 113 CONG. REC. 14–26, 90th Cong. 1st Sess.

19. 113 CONG. REC. 4997, 90th Cong. 1st Sess.

Whereas,

The Select Committee appointed pursuant to H. Res. 1 (90th Congress) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives and holds a Certificate of Election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964, to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D.C. or the State of New York as required by law. . . .

Fourth, as Chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member; Now, therefore, be it

Resolved,

1. That the Speaker administer the oath of office to the said Adam Clayton Powell, Member-elect from the Eighteenth District of the State of New York.

2. That upon taking the oath as a Member of the 90th Congress the said Adam Clayton Powell be brought to the bar of the House in the custody of the Sergeant-at-Arms of the House and be there publicly censured by the Speaker in the name of the House.

3. That Adam Clayton Powell, as punishment, pay to the Clerk of the House to be disposed of by him according to law, Forty Thousand Dollars ($40,000.00). The Sergeant-at-Arms of the House is directed to deduct One Thousand Dollars ($1,000.00) per month from the salary otherwise due the said Adam Clayton Powell and pay the same to said Clerk, said deductions to continue while any salary is due the said Adam Clayton Powell as a Member of the House of Representatives until said Forty Thousand Dollars ($40,000.00) is fully paid. Said sums received by the Clerk shall offset to the extent thereof any liability of the said Adam Clayton Powell to the United States of America with respect to the matters referred to in the above paragraphs Third and Fourth of the preamble to this Resolution.

4. That the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.

5. That if the said Adam Clayton Powell does not present himself to take the oath of office on or before March 13, 1967, the seat of the Eighteenth District of the State of New York shall be deemed vacant and the Speaker shall notify the Governor of the State of New York of the existing vacancy.

After debate,[20] the House refused to order the previous question on the original resolution and agreed to an amendment in the nature of a substitute, stating the abuses Mr. Powell had committed, and excluding him from membership in the House: [1]

MR. [THOMAS B.] CURTS [of Missouri]: Mr. Speaker, I offer an amendment as a substitute for the resolution offered by the Committee.

The Clerk read as follows:

Amendment offered by Mr. Curtis as a substitute for House Resolution 278:

Resolved, That said Adam Clayton Powell, Member-elect from the 18th District of the State of New York, be and the same hereby is excluded from membership in the 90th Congress and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.

While the amendment was pending, Speaker John W. McCormack, of Massachusetts, stated in response to a parliamentary inquiry that adoption of the resolution would require a majority vote:

MR. CELLER: Mr. Speaker, a parliamentary inquiry.

MR. CURTIS: Mr. Speaker, I yield to the gentleman for the purpose of making a parliamentary inquiry.

THE SPEAKER: The gentleman will state his parliamentary inquiry.

MR. CELLER: Anticipating that the Member-elect from the 18th District of New York satisfies the Constitution, and a question is raised in this resolution, would the resolution offered by the gentleman from Missouri require a two-thirds vote, in the sense that it might amount to an expulsion?

THE SPEAKER: In response to the parliamentary inquiry, on the amendment of the gentleman from Missouri [Mr. Curtis], action by a majority vote would be in accordance with the rules.

Speaker McCormack also overruled a point of order against the resolution based on the theory that the resolution was beyond the power of the House to adopt:

MR. [PHILLIP] BURTON of California: Mr. Speaker I raise a point of order.

THE SPEAKER: The gentleman will state his point of order.

MR. BURTON of California: In view of the fact that this resolution, among other things, states that the Member from New York is ineligible to serve in the other body, and therefore clearly beyond our power to so vote; and in addition to that fact it anticipates election results in the 18th District of New York, a matter upon which we cannot judge at this time, I raise the point of order that the resolution is an improper one for the House to consider, and that it clearly exceeds our authority.

THE SPEAKER: The Chair will observe to the gentleman that if the

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20. 113 CONG. REC. 4997–5039, 90th Cong. 1st Sess., Mar. 1, 1967. For a brief prepared by the Library of Congress buttressing the authority of Congress to exclude Members-elect for misconduct, see *id.* at pp. 5008–10.

1. *Id.* at p. 5038. The text of the substitute resolution appears *id.* at p. 5020.

point of order would be in order it would have been at a previous stage in the proceedings, and the gentleman's point of order comes too late.

MR. BURTON of California: May I make a parliamentary inquiry, Mr. Speaker?

THE SPEAKER: The gentleman will state the parliamentary inquiry.

MR. BURTON of California: Am I not correct in my statement that under the resolution on which we are about to vote, the only clear meaning of it would preclude the gentleman from New York from serving in the other body.

THE SPEAKER: The Chair would state that that is not a parliamentary inquiry. The Chair cannot pass upon that question.

Following the adoption of the resolution as amended, the House agreed to the preamble to the resolution.

§ 9.4 A qualified Member-elect who had been duly elected to the 90th Congress and who had been excluded by the House for improper conduct while a former Member instituted a suit to enjoin the Speaker, other Members, and House officers from enforcing the resolution of exclusion.

On Mar. 9, 1967, Speaker John W. McCormack, of Massachusetts, announced to the House that a suit had been instituted against him, and against officers and other Members of the House, in order to enjoin the enforcement of a resolution excluding Mr. Adam C. Powell, of New York, from House membership.[2] Mr. Powell's complaint sought a writ of mandamus directing the Speaker to administer him the oath of office as a Member of the 90th Congress.[3] As to the age, citizenship, and inhabitancy requirements of the Constitution, the complaint stated:

> . . . These are the sole and only qualifications prescribed by the Constitution for members of the House of Representatives, and they cannot be altered, modified, expanded or changed by the Congress of the United States. The House found that plaintiff Adam Clayton Powell, Jr. possesses the requisite qualifications for membership in the House (House Resolution No. 278 . . .) but nonetheless voted to exclude him.[4]

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2. 113 CONG. REC. 6035, 90th Cong. 1st Sess.

3. Subpenas to the Speaker and others, the complaint in the suit, and application (with memorandum) for the convening of a three-judge federal court were inserted in the Record *id.* at pp. 6036–40.

4. 113 CONG. REC. 6037, 90th Cong. 1st Sess.

Further briefs, memoranda, and the opinion of the United States District Court Judge dismissing the complaint are reprinted at 113 CONG. REC. 8729–62, 90th Cong. 1st Sess., Apr. 10, 1967.

On Jan. 3, 1969, the convening day of the 91st Congress, the House agreed to a resolution authorizing Speaker John W. McCormack, of Massachusetts, to administer the oath to Mr. Powell, but imposing various penalties against him.(5)

Parliamentarian's Note: The suit filed by Mr. Powell in the United States District Court for the District of Columbia eventually reached the United States Supreme Court, which held that the House could exclude a Member-elect only for failure to satisfy one of the qualifications mandated in the Constitution. The suit was still pending when Mr. Powell was sworn in at the commencement of the 91st Congress.(6)

Senate Determinations as to Qualifications

§ 9.5 In the 77th Congress, the Senate failed to expel, by the required two-thirds vote, a Senator whose qualifications had been challenged by reason of election fraud and of conduct involving moral turpitude.

On Jan. 3, 1941, at the convening of the 77th Congress, Senator William Langer, of North Dakota, took the oath of office without prejudice, despite letters, protests, and affidavits from citizens of North Dakota recommending that he be denied a congressional seat because of campaign fraud and conduct involving moral turpitude.(7)

The final right of Senator Langer to his seat was not acted upon until Mar. 9, 1942, when the Committee on Privileges and Elections offered Senate Resolution No. 220:

> *Resolved,* That the case of William Langer does not fall within the constitutional provisions for expulsion or any punishment by two-thirds vote, because Senator Langer is neither charged with nor proven to have committed disorderly behavior during his membership in the Senate.
>
> *Resolved,* That William Langer is not entitled to be a Senator of the United

5. 115 CONG. REC. 33, 34, 91st Cong. 1st Sess. (see H. Res. 2). For further discussion, see Ch. 12, infra.

6. *Powell* v *McCormack,* 395 U.S. 486 (1969). The Court dismissed the complaint as to the House Members named, since they were immune from inquiry under the Speech and Debate Clause of the Constitution. However, the presence of House officers as defendants gave the Court jurisdiction to enter a declaratory judgment against the House action. See Ch. 12, infra.

7. 87 CONG. REC. 3, 4, 77th Cong. 1st Sess.

The petition challenging Senator Langer's qualifications appears in the Record at 88 CONG. REC. 2077, 77th Cong. 2d Sess., Mar. 9, 1942.

States from the State of North Dakota.(8)

Extensive debate, on the charges against Senator Langer, on the procedure to be followed by the Senate in determining his right to a seat, and on the authority of the Senate to deny him a seat for other than failure to meet express constitutional qualifications, consumed Mar. 9 through Mar. 27, 1942.(9)

On Mar. 27, the Senate agreed to a resolution requiring a two-thirds vote for expulsion of Senator Langer.(10) On the same day, the Senate failed to pass by a two-thirds vote the resolution to expel Senator Langer.(11)

8. 88 CONG. REC. 2077, 77th Cong. 2d Sess.

9. *Id.* at pp. 2077–105, 2165–79, 2239–62, 2328–44, 2382–406, 2472–94, 2630–52, 2699–720, 2759–67, 2768–79, 2791–806, 2842–63, 2914–23, 2959–78, 3038–65. For debate on the constitutional issues and parliamentary precedents, see *id.* at pp. 2390–406. The minority report of the Committee on Privileges and Elections, contending that the Senate could only exclude for failure to meet express constitutional qualifications, is set out *id.* at pp. 2630–34.

10. *Id.* at p. 3064.

The Senate had decided in 1907 that a two-thirds vote was required to expel a Senator who had already taken the oath. 1 Hinds' Precedents §§ 481–484.

11. 88 CONG. REC. 3065, 77th Cong. 2d Sess.

§ 9.6 A Senator-elect whom members of the Senate sought to exclude from the 80th Congress, for allegedly corrupt campaign practices, died while his qualifications for a seat were still undetermined.

On Jan. 3, 1947, at the convening of the first session of the 80th Congress, the right to be sworn of Theodore Bilbo, Senator-elect from Mississippi, was challenged. The challenge was made through Senate Resolution No. 1, which alleged Mr. Bilbo had engaged in corrupt and fraudulent campaign practices and had conspired to prevent the exercise of voting rights of certain citizens.(12) Extensive debate occurred on Jan. 3 and 4 in relation to the right of Mr. Bilbo to be sworn and in relation to the charges and petitions against him.(13) During the debate, the question was discussed as to whether Mr. Bilbo could be excluded from the Senate for his allegedly improper conduct, without violating the principle of the exclusivity of the constitutional qualifications.(14)

12. 93 CONG. REC. 7, 80th Cong. 1st Sess.

13. *Id.* at pp. 7–33, Jan. 3, and at pp. 71–109, Jan. 4. The petition submitted to the Senate by concerned private citizens which challenged Mr. Bilbo's entitlement to a seat appears in the Record *id.* at pp. 91–93.

14. *Id.* at pp. 14–19.

The question of Mr. Bilbo's right to a seat, and his right to take the oath, were laid on the table pending his recovery from a medical operation.(15) Mr. Bilbo died on Aug. 21, 1947, without further action being taken by the Senate on his right to a seat.(16)

Qualifications of Senate Appointee

§ 9.7 The validity of an appointment to the Senate may be challenged on the ground that the appointee does not meet the qualifications required by state law.(17)

On Aug. 5, 1964,(18) Senator Everett M. Dirksen, of Illinois, challenged the validity of the appointment of Pierre Salinger, appointed to fill a vacancy in the Senate caused by the death of Senator Clair Engle, of California. Senator Dirksen's challenge was based on the fact that the California code required that an appointee by the governor must be an elector, and that an elector must be a resident for one year before the day of election. It was claimed that Mr. Salinger was not a resident of California for a period of one year prior to appointment.

The Senate, after lengthy debate, agreed to a motion that the oath be administered to Mr. Salinger, and that his credentials be referred to the Committee on Rules and Administration.

§ 10. Age, Citizenship, and Inhabitancy

The Constitution requires that a Representative be at least 25 years old, have a period of citizenship of at least seven years, and be an inhabitant of his state at the time of election.(19) Those three qualifications are unalterable by either the state legislature

15. *Id.* at p. 109.

16. See the announcement of Nov. 17, 1947, 93 CONG. REC. 10569, 80th Cong. 1st Sess.

17. Under U.S. Const. amend. 17, a state legislature may empower the state executive to make temporary appointments to the Senate in the event of a vacancy, with the legislature setting qualifications for appointees. However, in the case of a House vacancy, an election must be held, with candidates possessing the constitutional qualifications. See U.S. Const. art. I, § 2, clause 4.

18. 110 CONG. REC. 18107–20, 88th Cong. 2d Sess.

19. Art. I, § 2, clause 2. These requirements are the express "standing" qualifications for a Representative, although there are other prerequisites in the nature of qualifications and disqualifications (see § 9, supra).

or by Congress itself, except by way of constitutional amendment.[20]

The Constitution only sets a minimum age for membership.[1] No mandatory retirement age may be imposed,[2] although such proposals have been suggested.[3]

If a Member-elect is not of the required age, his name will not be entered on the roll of the House and he may not take the oath of office until he reaches the age of 25.[4] Likewise, the citizenship requirement of seven years need not be met until the time that a Member-elect presents himself to take the oath. The qualification of state inhabitancy must be met, however, at the time of election. That interpretation of article I was established in the 73d and 74th Congresses.[5] Both the Senate and the House concluded that a Member- or Senator-elect need not satisfy the age or citizenship requirements, or remove himself from an incompatible office,[6] until the time he presents himself to take the oath of office. The constitutional requirement of inhabitancy was construed to be applicable at the time of election.

In order to attain citizenship and satisfy that qualification for

20. See *Powell* v *McCormack,* 395 U.S. 486 (1969) and *Burton* v *United States,* 202 U.S. 344 (1906). Cf. *Bond* v *Floyd,* 385 U.S. 116 (1966).

The individual states cannot fashion more restrictive inhabitancy requirements, such as residency in the congressional district sought to be represented. *Exon* v *Tiemann,* 279 F Supp 609 (Neb. 1968); *State ex rel. Chavez* v *Evans,* 79 N.M. 578, 446 P. 2d 445 (1968); *Hellman* v *Collier,* 217 Md. 93, 141 A.2d 908 (1958).

1. For a commentary on the rationale for a minimum age requirement, see Story, *Commentaries on the Constitution of the United States,* § 616, Da Capo Press (N.Y. repub. 1970).

Mr. John Y. Brown (Ky.) did not take the oath in the House until the second session of the 36th Congress, because he did not meet the age qualification until that time (see 1 Hinds' Precedents § 418 and Biographical Directory of the American Congress, S. DOC. NO. 8, 92d Cong. 1st Sess. p. 650 [1971]). Even more unique was the case of Mr. William C. Claiborne (Tenn.), who evidently took the oath with the 5th and 6th Congresses while, respectively, only 22 and 24 years old (see Biographical Directory of the American Congress, S. Doc. No. 8, 92d Cong. 1st Sess. p. 739 [1971]).

2. See 5 USC § 8335 (no mandatory retirement age for Congressmen).

3. A mandatory retirement age would require either exclusion or expulsion for a disqualification not mentioned in the Constitution. Compare *Powell* v *McCormack,* 395 U.S. 486 (1969) and *Burton* v *U.S.,* 202 U.S. 344 (1906).

4. See 1 Hinds' Precedents § 418.

5. See §§ 10.1, 10.2, infra.

6. For a detailed discussion of the right of a Member-elect to hold an incompatible office, and to receive compensation both for such an office and for his congressional seat, before he has taken the oath, see § 13, infra.

membership, a Member-elect must either be born or naturalized in the United States.(7) And where a person has forfeited his rights as a citizen by reason of a felony conviction, his right to take a seat may be challenged.(8)

The House generally presumes that a Member-elect has satisfied the requirements of the inhabitancy qualification.(9)

Cross References

Age, citizenship, and inhabitancy qualifications of Delegates and Resident Commissioners, see § 3, supra.

Exclusiveness of the qualifications of age, citizenship, and inhabitancy, see § 9, supra.

Citizenship as affected by criminal conviction, see § 11, infra.

Relationship of age, citizenship, and inhabitancy to credentials and administration of oath, see Ch. 2, supra.

Collateral References

In general, see:
House Rules and Manual §§ 9–11 (comment to U.S. Const. art. I, § 2, clause 2) (1973).
House Rules and Manual § 35 (comment to U.S. Const. art. I, § 3, clause 3, qualifications of Senators) (1973).

Commentaries on the constitutional provisions, see:
Schwartz, *A Commentary on the Constitution of the United States,* p. 97, McMillan Co. (N.Y. 1963).
Story, *Commentaries on the Constitution of the United States,* § 616, Da Capo Press (N.Y. repub. 1970).

Time of meeting qualifications, see:
S. REPT. NO. 904, 74th Cong. 1st Sess., reprinted at 79 CONG. REC. 9651–53, 74th Cong. 1st Sess., June 19, 1935.

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7. See U.S. Const. amend. 14, § 1, for the definition of citizenship.

Aliens cannot stand for election to Congress. *Narisiades* v *Shaughnessy,* 342 U.S. 580, rehearing denied, 343 U.S. 936 (1952).

Generally, citizenship is assumed, and failure to produce proof thereof has not acted as an impediment to holding office. See 1 Hinds' Precedents §§ 420, 424; 6 Cannon's Precedents § 184.

8. See § 10.3, infra.

9. For a catalog of House decisions on inhabitancy, based on specific facts, see *House Rules and Manual* § 11 (comment to U.S. Const. art. I, § 2, clause 2) (1973) and USCA notes to U.S. Const. art. I, § 2, clause 2.

For a catalog of analogous Senate decisions on inhabitancy, see *House Rules and Manual* § 35 (comment to U.S. Const. art. I, § 3, clause 3) (1973).

Age and Citizenship

§ 10.1 A Member who has been a citizen for seven years when sworn, although not when elected or upon commencement of his term, is entitled to retain a seat, since the age and citizenship qualifications of the Constitution need not be met until the time membership actually commences.

In the 73d Congress, Representative-elect from Pennsylvania Henry Ellenbogen did not take the oath of office until the beginning of the second session on Jan. 3, 1934, although Congress had convened on Mar. 4, 1933. Mr. Ellenbogen forestalled taking the oath since he had not attained the seven-year citizenship requirement of the Constitution either at the time of election, Nov. 8, 1932, or at the commencement of his term on Mar. 4.[10]

On Mar. 11, 1933,[11] the right of Mr. Ellenbogen to his seat was challenged by memorial based on his alleged failure to meet the citizenship qualification of the Constitution. His right to a seat was referred to committee, and the House adopted the following resolution on June 15, 1934:

> *Resolved,* That when Henry Ellenboen on January 3, 1934, took the oath of office as a Representative from the 33d Congressional district of the State of Pennsylvania, he was duly qualified to take such oath; and it be further
>
> *Resolved,* That said Henry Ellenbogen was duly elected as a Representative from the 33d district of Pennsylvania, and is entitled to retain his seat.

§ 10.2 As a Member-elect or Senator-elect does not become a Member of Congress until he is sworn, he need not meet the age and citizen requirements of the Constitution until he appears to take the oath of office (Senate decision).

On Jan. 3, 1935,[12] the opening day of the 74th Congress, the oath was not administered to Rush D. Holt, Senator-elect from West Virginia, who was absent. In subsequent proceedings in the Senate, a contestant to Mr. Holt's seat asked that the election be voided on the ground that Mr. Holt was not yet 30 years old when elected and that he therefore did not meet the qualification stated in article I, section 3, clause 3, of the United States Constitution. The right of Mr. Holt to the seat was referred to the Committee on Privileges and Elections.

On June 19, 1935,[13] the committee submitted its report to the Senate. The majority report pro-

10. At the time of election, Mr. Ellenbogen had been a citizen for six years and five months; at the commencement of the term he had been a citizen for six years and eight and a half months. See S. REPT. NO. 904, 74th Cong. 1st Sess., reprinted in 79 CONG. REC. 9651–53, June 19, 1935.

11. 77 CONG. REC. 239, 73d Cong. 1st Sess.

12. 79 CONG. REC. 8, 74th Cong. 1st Sess.

13. 79 CONG. REC. 9651–53, 74th Cong. 1st Sess.

posed that Mr. Holt be seated and sworn, since he met the age qualification when he "presented himself to the Senate to take the oath and to assume the duties of the office."[14] The committee had concluded, based upon constitutional interpretation and upon precedents of the House and of the Senate, that the residency requirement of article I, section 3, clause 3, must be met at the time of election, but that the age and citizenship requirement need not be satisfied until an elected Member of Congress presents himself to take the oath.[15]

On June 21, 1935,[16] the Senate rejected a substitute amendment voiding Mr. Holt's election and adopted the original resolution, seating Mr. Holt and specifically referring to his satisfaction of the age requirement upon presenting himself to take the oath.

14. 79 CONG. REC. 9653, 74th Cong. 1st Sess. The report, No. 904, was reprinted in the Record, *id.* at pp. 9651–53.

15. The age, citizenship, and residency qualifications for Members of the House, at U.S. Const. art. I, § 2, clause 2, have the same phrasing as the Senate requirements (the only difference being the number of years for age and citizenship), and are therefore subject to the same constitutional interpretation. See 1 Hinds' Precedents § 418; *cf.* 1 Hinds' Precedents §§ 429, 499.

16. 79 CONG. REC. 9841, 9842, 74th Cong. 1st Sess.

§ 10.3 Where the right to a seat of a Representative-elect was challenged on the ground that he had forfeited his rights as a citizen by reason of a felony conviction, the House authorized the Speaker to administer the oath but referred the question of final right to an election committee.

On Mar. 10, 1933,[17] the right of Francis H. Shoemaker, of Minnesota, to be sworn in was challenged on the ground that he had been convicted of a felony, and that under the Minnesota state constitution any felony conviction resulted in the loss of citizenship, unless restored by the state legislature.[18]

Since, however, Mr. Shoemaker had been convicted of a federal and not a state felony, and the conviction involved no moral turpitude, the House adopted a resolution authorizing Mr. Shoemaker to be sworn but referring the question of his final right to a seat to an elections committee:[19]

THE SPEAKER:[20] The pending business is the seating of Mr. Francis H.

17. 77 CONG. REC. 131–39, 73d Cong. 1st Sess.

18. *Id.* at p. 134.

19. *Id.* at pp. 137–39.

20. Henry T. Rainey (Ill.).

Shoemaker, of Minnesota. Without objection, the Clerk will again report the resolution offered by the gentleman from California [Mr. Carter].

The Clerk read as follows:

Mr. Carter of California offers the following resolution:

> Whereas it is charged that Francis H. Shoemaker, a Representative elect to the Seventy-third Congress from the State of Minnesota, is ineligible to a seat in the House of Representatives; and
>
> Whereas such charge is made through a Member of this House, on his responsibility as such Member and on the basis, as he asserts, of public records, statements, and papers evidencing such ineligibility: Therefore
>
> *Resolved,* That the question of prima facie right of Francis H. Shoemaker to be sworn in as Representative from the State of Minnesota in the Seventy-third Congress, as well as of his final right to a seat therein as such Representative, be referred to the Committee on Elections No. 1, when elected, and until such committee shall report upon and the House decide such questions and right the said Francis H. Shoemaker shall not be sworn in or be permitted to occupy a seat in the House, and said committee shall have power to send for persons and papers and examine witnesses on oath in relation to the subject matter of this resolution. . . .

The Clerk read as follows:

Substitute resolution offered by Mr. Kvale:

> *Resolved,* That the Speaker is hereby authorized and directed to administer the oath of office to the gentleman from Minnesota, Mr. Francis H. Shoemaker;
>
> *Resolved,* That the question of the final right of Francis H. Shoemaker to a seat in the Seventy-third Congress be referred to the Committee on Elections No. 2, when elected, and said committee shall have the power to send for persons and papers and examine witnesses on oath in relation to the subject matter of this resolution. . . .

THE SPEAKER: Under the unanimous-consent agreement, the previous question is ordered.

The question is on agreeing to the substitute resolution.

The question was taken; and the Chair being in doubt, the House divided and there were—ayes 230, noes 75.

So the substitute resolution was agreed to.

THE SPEAKER: The question now recurs on the resolution as amended by the substitute.

MR. [PAUL J.] KVALE [of Minnesota]: Mr. Speaker, a parliamentary inquiry.

THE SPEAKER: The gentleman will state it.

MR. KVALE: Mr. Speaker, at what stage would it be in order to move to strike the preamble from the original resolution?

THE SPEAKER: Immediately after the vote on the resolution.

The resolution, as amended, was agreed to.

By unanimous consent, the preamble was stricken from the resolution, and a motion to reconsider laid on the table.

Hon. Francis H. Shoemaker, of the State of Minnesota, appeared at the bar of the House and received the oath of office.

Inhabitancy

§ 10.4 In the 90th Congress, challenges to a seat were

based on the failure to satisfy the state inhabitancy qualification but were not affirmed by the House, which excluded the Member-elect on other grounds.

On Mar. 1, 1967, the House excluded Adam C. Powell, Member-elect from New York, for prior misconduct as a Member of the House.(1) House Resolution No. 278, excluding Mr. Powell,(2) stated that Mr. Powell had met the constitutional qualifications of age, citizenship, and inhabitancy, although challenges had been made on Jan. 10, 1967, on Feb. 28, 1967, and on Mar. 1, 1967, to Mr. Powell's status as an inhabitant of the State of New York.

On Jan. 10, 1967, during debate on whether Mr. Powell should be seated, Mr. Samuel Stratton, of New York, arose to state:

> If a Representative-elect chooses to remain outside of his State rather than comply with the duly constituted orders of the courts of his own State, then I believe there is a very real question of whether he is in fact still a resident of the State which he purports to represent as the Constitution says he must be.(3)

On the same day, Mr. Theodore Kupferman, of New York, arose to state that he also doubted that Mr. Powell was a resident of New York, since he was absent during House proceedings on an issue important to the State of New York, and was in Bimini.(4)

On Feb. 28, 1967, shortly before the House considered Mr. Powell's right to a seat, Mr. Stratton stated that he intended to offer an amendment to the resolution granting Mr. Powell his seat, in order to demand that Mr. Powell subject himself to the New York State courts, to satisfy the inhabitancy requirement of the Constitution. Mr. Stratton quoted from a committee report of the 70th Congress:

> We think that a fair interpretation of the letter and the spirit of this paragraph with respect to the word "inhabitant" is that the framers intended that for a person to bring himself within the scope of its meaning he must have and occupy a place of abode within the particular State in which he claims inhabitancy, and that he must have openly and avowedly by act and by word subjected himself to the duties and responsibilities of a member of the body politic of that particular State.(5)

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1. See § 9.3, supra, for a synopsis of the proceedings.

2. See 113 CONG. REC. 4997 (original resolution) and 5020 (adopted amendment), 90th Cong. 1st Sess., Mar. 1, 1967.

3. 113 CONG. REC. 20, 90th Cong. 1st Sess. Congress has decided that a Member must meet the inhabitancy requirement at the time of the election, but need not satisfy the age and citizenship requirements until appearing to be sworn. See §§ 10.1, 10.2, supra.

4. *Id.* at p. 21.

5. 113 CONG. REC. 4772, 90th Cong. 1st Sess. The report cited by Mr. Strat-

On Mar. 1, 1967, Mr. Fletcher Thompson, of Georgia, stated that he intended to offer an amendment stating that Mr. Powell was not entitled to a seat in the House since he had abandoned inhabitancy in New York prior to election.(6)

When the House excluded Mr. Powell, however, the resolution of exclusion admitted Mr. Powell's satisfaction of the inhabitancy qualification but excluded him on other grounds.(7)

§ 11. Conviction of Crime; Past Conduct

Although the Senate or the House may expel a seated Member for disorderly conduct committed during his term,(8) Congress has no general authority to exclude a Member-elect solely for criminal or immoral conduct committed prior to the convening of the Congress to which elected.(9) Although the Senate and the House have affirmed their power

ton was submitted in the case of James Beck (see 6 Cannon's Precedents § 174), wherein the House found to be an inhabitant of Pennsylvania a Member who occupied an apartment in Pennsylvania one or more times each week, and exercised his civic rights there, although owning summer homes and residences in other states.

6. 113 CONG. REC. 4993, 90th Cong. 1st Sess.

7. H. JOUR. 313, 314, 90th Cong. 1st Sess., Mar. 1, 1967. For Speaker John W. McCormack's responses to parliamentary inquiries related to the meaning of the adopted resolution and preamble in regards to the inhabitancy qualification, see 113 CONG. REC. 5038, 90th Cong. 1st Sess., Mar. 1, 1967.

8. U.S. Const. art. I, § 5, clause 2. See, in general, Ch. 12, infra.

9. For a discussion of the limits on Congress to add qualifications to those specified in the Constitution, see § 9, supra. See also *House Rules and Manual* §§ 10–12 (comment to U.S. Const. art. I, § 2, clause 2, setting qualifications for Members) (1973).

For the views of constitutional commentators, see Federalist No. 60 (Hamilton), Modern Library (1937); Story, *Commentaries on the Constitution of the United States,* §§ 616–624, Da Capo Press (N.Y. repub. 1970); Schwartz, *A Commentary on the Constitution of the United States,* p. 97, McMillan Co. (N.Y. 1963); Dempsey, Control by Congress Over the Seating and Disciplining of Members, Ph.D. dissertation, University of Michigan (1956) (on file with Library of Congress); Note, The Right of Congress to Exclude Its Members, 33 Va. L. Rev. 322 (1947); Note, The Power of the House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673 (1968); Dionisopoulos, A Commentary on the Constitutional Issues in the Powell and Related Cases, 17 Journal Public Law 103 (1968).

to exclude for improper conduct on many occasions before 1936, and on several occasions since 1936,[10] the Supreme Court decided in 1969 that the House or the Senate was limited to determining whether a Member-elect had satisfied the standing qualifications of age, citizenship, and residency.[11]

The Supreme Court case arose from the exclusion of a Member-elect (Adam Clayton Powell) in the 90th Congress for improper conduct as a Member of past Congresses.[12] The abuses charged against the Member-elect never became the subject of criminal conviction. The House decided not only that it could exclude for abuse of power while a past Congressman and past committee chairman, but also that it could exclude by a simple majority vote. In denying such congressional power, the Supreme Court stated that the qualifications of the Constitution were exclusive and that the Congress could not deny to constituents their choice of a Representative, even if the majority of the House found his past conduct so criminal or so immoral as to render him unsuited for membership.

On two occasions since 1936, proceedings in the Senate have sought to deny seats to Senators-elect for immoral or criminal activity committed prior to the convening of Congress.[13] Both attempts were unsuccessful.

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10. For exclusions by the House, see 1 Hinds' Precedents § 449 (1868, Civil War disloyalty); § 451 (1862, Civil War disloyalty); § 459 (1868, Civil War disloyalty); § 620 (1869, Civil War disloyalty); § 464 (1870, "infamous character," selling appointments to West Point); § 473 (1882, practice of polygamy by Delegate-elect); §§ 474–480 (1900, practice and conviction of polygamy); 6 Cannon's Precedents §§ 56–59 (1919, acts of disloyalty constituting criminal conduct); § 11.1, infra (1967, abuse of power while past Member and committee chairman).

The Senate has excluded one Senator-elect for disloyalty (see 1 Hinds' Precedents § 457 [1867]), but seated a Senator-elect accused of polygamy (see 1 Hinds' Precedents § 483 [1907]). For the two attempts in the Senate since 1936 to deny seats to Senators-elect for prior improper conduct, see §§ 11.2, 11.3, infra. In another instance, a Senator whose character qualifications were challenged by petition was held entitled to his seat without discussion in the Senate (see 81 CONG. REC. 5633, 75th Cong. 1st Sess., June 14, 1937).

11. *Powell* v *McCormack,* 395 U.S. 486 (1969).

12. See § 9.3, supra, for a complete synopsis of the House proceedings leading to the vote on exclusion, and see § 9.4, supra, for a complete synopsis of the litigation by the excluded Member against House Members and officers.

13. See §§ 11.2, 11.3, infra.

Congress may have the power to exclude a Member-elect for improper conduct when such conduct relates to campaign activities.(14) Congress is the sole judge of the elections of its Members,(15) and regulation of elections is a subject of various federal statutes. If the House found that a Member had conducted such a corrupt or fraudulent campaign as to render the election invalid, the House could deny a seat to such Member-elect, not for disqualifications but for failure to be duly elected.(16)

Generally, any state constitution(17) or any statute(18) which disqualifies a congressional candidate for criminal conviction is invalid and does not operate to disqualify the candidate for a congressional seat.

Cross References

Conduct, punishment, censure, and expulsion, see Ch. 12, infra.
Charges against Member as raising personal privilege, see Ch. 11, infra.
Improper campaign practices, see Ch. 8, infra.
Impeachment and improper conduct, see Ch. 14, infra.
Resignations after conviction of crime, see Ch. 37, infra.
Challenging the right to be sworn, based on improper conduct, see Ch. 2, supra.
Demotions in seniority for improper conduct, see § 2, supra.

Collateral Reference

Sense of the House, Member's actions, convictions of certain crimes, H. REPT. NO. 92–1039, 92d Cong. 1st Sess. (1972).

Exclusion for Improper Conduct

§ 11.1 The House excluded in the 90th Congress a Member-elect for avoidance of state court process and abuse of his congressional position while a Member of past Congresses.(19)

14. See Ch. 12, infra.

15. U.S. Const. art. I, § 5, clause 1.

16. See Ch. 8, infra, for elections and election campaigns and Ch. 9, infra, for election contests.

17. See § 11.4, infra, for an occasion where the House declined to exclude a Member-elect whose citizenship had been challenged, since he had been convicted of a felony and his state's constitution stripped of citizenship persons convicted of felonies.

18. The Supreme Court held in *Burton* v *U.S.*, 202 U.S. 344 (1906) that although a statute barred a Congressman convicted of accepting a bribe from holding office, a judgment of conviction did not automatically expel him or compel Congress to expel him.

A state cannot by statute prevent a candidate from seeking office by virtue of his having been convicted of a felony. Application of Ferguson, 294 N.Y.S. 2d 174, 57 Misc. 2d 1041 (1968).

19. For a complete synopsis of the proceedings leading to Mr. Powell's ex-

On Mar. 1, 1967, the House excluded Member-elect Adam C. Powell, of New York, through passage of House Resolution No. 278 by a majority vote. The preamble of the resolution read in part as follows:

> Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.
>
> Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964, to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D.C. or the State of New York as required by law. . . .
>
> Fourth, as Chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.
>
> Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member. . . .[20]

clusion, and of the litigation filed by him against the House, see §§ 9.3, 9.4, supra.

Exclusion of Senator for Improper Conduct

§ 11.2 A Senator-elect whom Members of the Senate sought to exclude from the 80th Congress, for corrupt campaign practices and past abuse of congressional office, died while his qualifications for a seat were still undetermined.

On Jan. 4, 1947, at the convening of the 80th Congress, the right to be sworn of Mr. Theodore Bilbo, of Mississippi, was laid on the table and not taken up again due to his intervening death.[1]

The right to be sworn of Mr. Bilbo had been challenged through Senate Resolution No. 1, whose preamble read as follows:

> Whereas the Special Committee To Investigate Senatorial Campaign Expenditures, 1946, has conducted an in-

20. 113 CONG. REC. 4997, 90th Cong. 1st Sess. (original resolution introduced by the special committee on the right of Mr. Powell to his seat). The House retained the preamble and adopted an amendment, text *id.* at p. 5020, which excluded Mr. Powell from the House.

1. 93 CONG. REC. 109, 80th Cong. 1st Sess.

vestigation into the senatorial election in Mississippi in 1946, which investigation indicates that Theodore G. Bilbo may be guilty of violating the Constitution of the United States, the statutes of the United States, and his oath of office as a Senator of the United States in that he is alleged to have conspired to prevent citizens of the United States from exercising their constitutional rights to participate in the said election; and that he is alleged to have committed violations of Public Law 252, Seventy-sixth Congress, commonly known as the Hatch Act; and

Whereas the Special Committee To Investigate the National Defense Program has completed an inquiry into certain transactions between Theodore G. Bilbo and various war contractors and has found officially that the said Bilbo, "in return for the aid he had given certain war contractors and others before Federal departments, solicited and received political contributions, accepted personal compensation, gifts, and services, and solicited and accepted substantial amounts of money for a personal charity administered solely by him" . . . and . . . "that by these transactions Senator Bilbo misused his high office and violated certain Federal statutes"; and

Whereas the evidence adduced before the said committees indicates that the credentials for a seat in the Senate presented by the said Theodore G. Bilbo are tainted with fraud and corruption; and that the seating of the said Bilbo would be contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuation of free Government and the preservation of our constitutional liberties. . . .[2]

2. 93 CONG. REC. 7, 8, 80th Cong. 1st Sess., Jan. 3, 1947.

§ 11.3 In the 77th Congress, the Senate failed to expel, by the required two-thirds vote, a Senator whose qualifications had been challenged by reason of election fraud and of conduct involving moral turpitude.

On Jan. 3, 1941, at the convening of the 77th Congress, Senator William Langer, of North Dakota, took the oath of office, despite charges from the citizens of his state recommending he be denied a congressional seat because of campaign fraud and past conduct involving moral turpitude.[3]

The petition against Senator Langer charged: control of election machinery; casting of illegal election ballots; destruction of legal election ballots; fraudulent campaign advertising; conspiracy to avoid federal law; perjury; bribery; fraud; promises of political favors.[4]

After determining that a two-thirds vote was necessary for expulsion,[5] the Senate failed to expel Senator Langer.[6]

3. 87 CONG. REC. 3, 4, 77th Cong. 1st Sess.

4. 88 CONG. REC. 2077–80, 77th Cong. 2d Sess., Mar. 9, 1942.

5. 88 CONG. REC. 3064, 77th Cong. 2d Sess., Mar. 27, 1942.

6. *Id.* at p. 3065.

Criminal Conviction

§ 11.4 Where the right to a seat of a Representative-elect was challenged on the ground that he had forfeited his rights as a citizen by reason of a felony conviction, the House declined to exclude him.[7]

On Mar. 10, 1933,[8] the right of Francis H. Shoemaker, of Minnesota, to be sworn in was challenged on the ground that he had been convicted of a felony, and that under the Minnesota state constitution any felony conviction resulted in the loss of citizenship, unless restored by the state legislature.[9]

Since, however, Mr. Shoemaker had been convicted of a federal offense (mailing libelous and indecent matter on wrappers or envelopes) and not a state felony, and the conviction involved no moral turpitude, the House adopted a resolution authorizing Mr. Shoemaker to be sworn but referring the question of his final right to a seat to an elections committee.[10]

No further action was taken and Mr. Shoemaker served a full term as a Member of the House.

§ 11.5 The House adopted a resolution expressing the sense of the House that Members convicted of certain felonies should refrain from participating in committee business and from voting in the House until the presumption of innocence was reinstated or until the Member was re-elected to the House.

On Nov. 14, 1973,[11] the House adopted House Resolution 700, providing for the consideration of a resolution expressing the sense of the House with respect to actions which should be taken by Members upon being convicted of certain crimes. Mr. Charles M. Price, of Illinois, of the reporting committee (Standards of Official Conduct) asked unanimous consent that the resolution provided

7. On several occasions, since 1921, Members of the House have been convicted of crimes without House disciplinary action being taken. See the remarks of Mr. John Conyers, Jr. (Mich.) 113 CONG. REC. 5007, 90th Cong. 1st Sess., Mar. 1, 1967.

On one occasion, a charge that a Member had been convicted of playing poker prior to his becoming a Member was held not to involve his representative capacity. See 78 CONG. REC. 2464, 73d Cong. 2d Sess., Feb. 13, 1934.

8. 77 CONG. REC. 131–39, 73d Cong. 1st Sess.

9. *Id.* at p. 134.

10. *Id.* at pp. 137–39.

11. 119 CONG. REC. 36943, 36944, 93d Cong. 1st Sess.

for, House Resolution 128, be considered in the House as in the Committee of the Whole. The request was granted, and the House adopted the following resolution:

H. RES. 128

Resolved, That it is the sense of the House of Representatives that any Member of, Delegate to, or Resident Commissioner in, the House of Representatives who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is then a member and should refrain from voting on any question at a meeting of the House, or of the Committee of the Whole House, unless or until judicial or executive proceedings result in reinstatement of the presumption of his innocence or until he is reelected to the House after the date of such conviction. This resolution shall not affect any other authority of the House with respect to the behavior and conduct of its Members.(12)

§ 12. Loyalty

Loyalty to the United States or to its government is not listed as one of the standing qualifications for membership in Congress.(13) The Supreme Court decided in 1969 that Congress could not add to the constitutional qualifications for Members, and could only adjudge the absence or lack of the standing qualifications of age, citizenship, and residency.(14) The Powell case did not specifically discuss, however, the constitutional provisions which are related to loyalty and which could be construed as qualifications for membership.

First, the Constitution requires that every Member swear to an oath to support the Constitution.(15) If a Member-elect were afflicted with insanity he could probably not take a meaningful oath, a question which has arisen in the Senate but not in the House.(16)

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12. For a similar resolution reported in a preceding Congress but not considered in the House, see H. Res. 933, 92d Cong.

13. The congressional precedents on loyalty all arose prior to 1936 (see 1 Hinds' Precedents §§ 449, 451, 457, 459, 620). The last House debate on exclusion for disloyalty occurred in 1919 through 1921 (see 6 Cannon's Precedents §§ 56–58).

14. *Powell* v *McCormack,* 395 U.S. 486 (1969).

A state cannot require of a congressional candidate declarations of loyalty, or affidavits averring lack of intent to seek forcible overthrow of the government. *Shubb* v *Simpson,* 76 A.2d 332 (Md. 1950).

15. U.S. Const. art. VI, § 3. The form of the oath which is taken appears at 5 USC § 3331. For detailed information on the evolution of the oath of office, see Ch. 2, supra.

16. See 1 Hinds' Precedents § 221, where the Senate allowed a Senator-elect to

The House has not reached the question whether an express disavowal of the oath to support the Constitution by a Member-elect would prohibit him from taking office. In a recent case the Supreme Court denied to state legislators the power to look behind the mere willingness of a legislator-elect to swear to uphold the Constitution, in order to test his alleged sincerity in taking the oath.[17] The court did however distinguish the facts before it from a hypothetical situation where a legislator might swear to an oath pro forma while declaring or manifesting his disagreement with or indifference to the oath being taken.[18]

be sworn after satisfying itself that he had the mental capacity to take the oath.

17. *Bond* v *Floyd,* 385 U.S. 116 (1966). The state legislature had attempted to exclude Mr. Bond because he had voiced objections to certain national policies. The main argument proposed by the Georgia state legislature for excluding him was that since the taking of the oath was an enumerated qualification for office, and since the legislature had the sole power to judge the meeting of qualifications, the body had the power to look beyond the plain words of the oath and the simple willingness to take it, in order to adjudge the state of mind of the legislator taking it.

18. *Id.* at p. 132.

The 14th amendment to the Constitution imposes a further test of loyalty on Representatives, by prohibiting the taking of office by any person who has engaged in insurrection or given aid or comfort to the enemies of the United States after previously having taken the official oath to support the Constitution.[19] Early in this century, the House denied a seat to a Member-elect under the provisions of the 14th amendment.[20]

In the period immediately following the Civil War, the Congress added a statutory qualification to those enumerated in the Constitution by requiring a loyalty "test oath" of Members-elect.[1] A number of persons were

19. U.S. Const. amend. 14, § 3. Congress may, by a vote of two-thirds, remove such disability for any person. The disabilities arising from Civil War activities were generally removed by the Act of June 6, 1898, Ch. 389, 30 Stat. 432. For congressional determination of the meaning of "aid and comfort" to enemies, as used in the 14th amendment, see 6 Cannon's Precedents §§ 56–58.

20. See 6 Cannon's Precedents §§ 56–58. When the Member-elect in that case, Mr. Victor L. Berger (Wisc.) was excluded, his conviction for espionage was presently being appealed in the federal courts. After the Supreme Court voided his conviction, *Berger et al.* v *U.S.*, 255 U.S. 22 (1921), Mr. Berger was elected to succeeding Congresses.

1. Act of July 2, 1862, 20 Stat. 502, termed the "iron-clad" or "test" oath

denied seats in the House by virtue of that provision.(2)

Cross References

Administration of the oath and challenges to the right to be sworn, see Ch. 2, supra.

Administration of the oath to officers, officials, and employees, see Ch. 6, supra.

Conduct, punishment, censure, and expulsion, see Ch. 12, infra.

§ 13. Incompatible Offices

The Constitution prohibits service as a Member of Congress to one holding an office under the United States during the continuancy thereof; it also prohibits any Member from being appointed during his term to any civil office under the United States which was created or the emoluments of which were increased during his term.(3) The first prohibition, against holding incompatible offices, was designed to avoid executive influence on Members of Congress and to protect the principle of the separation of powers.(4) The latter prohibition attempts to ensure the disinterested vote of Members of Congress in creating civil offices and in increasing the salaries and privileges of such offices.(5) To bar

because of its exhaustive definition of disloyalty. See the extensive discussion at 1 Hinds' Precedents § 449 on whether that oath was unconstitutional, the House finding that it was not, despite a decision by the Supreme Court that the oath was unconstitutional as applied to lawyers, since it operated to perpetually exclude persons from a profession in an ex post facto manner. See *Ex parte Garland*, 4 Wall. 333 (1866). The minority opposition in the House to the 1862 oath argued that the oath was unconstitutional for two reasons: first, it was an ex post facto law, punishing individuals, without a trial, for offenses committed before the enactment; second, it purported to add qualifications to those enumerated in the Constitution for Members.

2. See 1 Hinds' Precedents §§ 449, 451, 459, 620.

3. Art. I, § 6, clause 2.

4. See The Federalist No. 76 (Hamilton), Modern Library (1937), and Story, *Commentaries on the Constitution of the United States* §§ 866–869, Da Capo Press (N.Y. repub. 1970). There was little discussion of this provision at the Constitutional and Ratifying Conventions, its purpose being self-evident.

5. "The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the Representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the ex-

appointment, the increased emolument must be measurable and must accrue to the appointee upon taking office.(6)

The holding of incompatible offices may be challenged either by Members of the House or by private citizens at the convening of Congress.(7) On some occasions, the House has assumed or declared the seat vacant of a Member who has accepted an incompatible office.(8) A resolution excluding a Member who has accepted such an office may be agreed to by a majority vote.(9)

One issue arising from the interpretation of the prohibition against the holding of incompatible offices is the point in time at which a Member-elect must remove himself from the incompatible office.(10) The main question is whether a Member-elect may continue to hold an incompatible office up to the time of convening of Congress or even beyond the initial meeting of Congress.(11) It has

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tent of the principle; for his appointment is restricted only 'during the time, for which he was elected'; thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination." Story, *Commentaries on the Constitution of the United States* § 864, Da Capo Press (N.Y. repub. 1970).

6. See §§ 13.4, et seq., infra.

7. See, generally, *House Rules and Manual* §§ 95–98 (comment to U.S. Const. art. I, § 6, clause 2) (1973).

The Committee on the Judiciary has jurisdiction over the acceptance by Members of incompatible offices. *House Rules and Manual* § 707 (1973).

8. See 1 Hinds' Precedents §§ 488, 492, 501, 502, 572; 6 Cannon's Precedents § 65.

9. 1 Hinds' Precedents § 490. A majority vote is sufficient since the House is the sole judge of the qualifications of its Members. U.S. Const. art. I, § 5, clause 1.

10. For a summary of the precedents and rulings, see *House Rules and Manual* §§ 95–98 (1973) (comment to U.S. Const. art. I, § 6, clause 2).

11. For instances where Members-elect were held to have disqualified themselves for seats in the House by holding incompatible offices beyond the convening of Congress, see 1 Hinds' Precedents §§ 492, 500.

For decisions allowing Members-elect to defer the choice between the incompatible office and the congressional seat beyond the assembly of Congress, see 1 Hinds' Precedents §§ 498, 503. See also § 13.1, infra, for a recent precedent on the issue.

The rationale for allowing Members-elect to defer satisfying the age and citizenship requirements of the Constitution until appearing to take the oath (see §§ 10.1, 10.2, supra) would appear to allow the deferral of the choice between incompatible offices to the same point in time. See S. REPT. NO. 904, 74th Cong. 1st Sess., reprinted at 79 CONG. REC. 9651–53, 74th Cong. 1st Sess.

been established that a Member-elect is not disqualified from taking his seat if he holds an incompatible office up to the day Congress convenes.(12)

The most recent precedent in relation to this issue occurred in the Senate at the opening of the 85th Congress, when a Senator-elect continued to hold a state executive position until five days after the meeting of Congress, when he appeared to take the oath; there was not, however, any explicit ruling on the subject, as his right to be sworn was not challenged.(13) The Senator-elect in that case waived his congressional salary up to the time of taking the oath.(14)

The House has affirmatively decided that an election contestant holding an incompatible office need not make his selection until the House has declared him entitled to the seat. 1 Hinds' Precedents § 505.

12. See 1 Hinds' Precedents § 499. In 15 Op. Att'y Gen. 281 (1877) it was concluded that a Member-elect could continue to act as a government contractor up to the time Congress met.

13. See § 13.1, infra.

14. In 14 Op. Att'y Gen. 406 (1874) it was proposed that since a Member-elect could lawfully hold an office under the United States until appearing to be sworn, he was entitled to receive pay for both positions before becoming a sworn Member. That conclusion was based in part on the decision in *Converse* v *U.S.,* 62 U.S. 463 (1859) that a person holding two compatible offices under the government is not precluded from receiving the salaries of both by any provision of the general laws prohibiting double compensation (see also 9 Op. Att'y Gen. 508 [1860]; 12 Op. Att'y Gen. 459 [1868]).

See, however, the determination of the House at 1 Hinds' Precedents § 500 that a Member-elect receiving pay as a military officer was disqualified from taking his congressional seat or from receiving any congressional salary as of the moment the Congress to which he was elected convened, regardless of the time when he would appear to take the oath (the main issue before the committee was not the status of that Member-elect, who resigned before taking the oath, but the entitlement to salary of his successor). That precedent, inferring that a Member-elect becomes a full Member upon the assembly of the House, is at variance with other rulings expressing the conclusion that he does not become a Member until being sworn (see for example, 1 Hinds' Precedents § 499).

A report cited at 1 Hinds' Precedents § 184, while determining that a Member-elect could receive compensation for another governmental office before the convening of Congress, stated that the precedents in the House did not "determine that he [the Member-elect] may also be compensated as a Member of Congress for the same time for which he was compensated in the other office."

Extensive House debate on the meaning of the word "office" as used in the constitutional provision suggests that the appointment of Members-elect as commissioners without legislative, executive, or judicial powers is not incompatible.(15) A prohibited office is one characterized by tenure, duration, emoluments, and duties inconsistent with those of a Member of Congress.(16)

Various federal statutes prohibit Members from holding certain enumerated offices inconsistent with membership(17) and from contracting with the government.(17)

The Constitution does not prohibit Members of Congress from holding state elective or appointive offices. The House has determined, however, that a high state office is incompatible with congressional membership, due to the manifest inconsistency of the respective duties of the positions.(19) In addition, many state constitutions and statutes prohibit state elective or appointive officials from holding congressional seats.(20) Some state statutes which require candidates for congressional seats to first resign from state offices have been challenged on the ground that they unconstitutionally add to the qualifications of Members-elect

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The committee chose to leave the question open in their report.

15. See 1 Hinds' Precedents § 493.

16. See *U.S.* v *Hartwell,* 73 U.S. 385, 393 (1868) and § 13.2, infra.

A Member may undertake temporary paid service for the executive (see 1 Hinds' Precedents § 495 and 2 Hinds' Precedents § 993).

17. See 12 USC § 303 (board of governors, Federal Reserve System, Director of Federal Reserve Bank); 18 USC § 204 (practice before Court of Claims); 25 USC § 700 (practice before Indian Claims Commission).

18. The House has declined to hold that a contractor with the government is disqualified to serve as a Member (see 1 Hinds' Precedents § 496); see, however, 18 USC § 203(a) (no compensation for a Member for services relating to proceedings where government party or interest); 18 USC § 431 (no contracts by Member with government); 33 USC § 702m (no interest, flood control contracts); 41 USC § 22 (no interest, all contracts with government).

19. See 6 Cannon's Precedents § 65. For instances where Senators-elect held high state positions beyond the meeting of Congress, but before taking the oath, see § 13.1, infra, and 1 Hinds' Precedents § 503.

20. See, for example, Pa. Const. art. 12, § 2. See also *State ex rel. Davis* v *Adams,* 238 So.2d 415 (Fla. 1970) (in course of discussing a Florida statute on the subject, the court listed the following states with similar constitutional or statutory provisions: Arizona, Wisconsin, Oklahoma, Delaware, Indiana, Washington).

and Senators-elect.(1) The common law concept that one may not hold incompatible offices and the requirement that Members of Congress attend upon the sessions of the House and Senate would act as bars to the holding of most state offices by Members of Congress.(2)

Cross References

Military service as incompatible office, see § 14, infra.
Incompatible offices as related to Delegates and Resident Commissioners, see § 3, supra.
House officers, officials, and employees and incompatible offices, see Ch. 6, supra.

Incompatible Offices

§ 13.1 A Senator-elect deferred his choice between an incompatible state office and his congressional seat until he appeared to take the oath, after the convening of Congress.(3)

Jacob K. Javits, Senator-elect from New York, did not appear on Jan. 3, 1957, the opening day of the 85th Congress, to take the oath with the rest of the Senate, but was administered the oath on Jan. 9, 1957.(4) No objection was made to the administration of the oath to Mr. Javits, although he did not resign from his position as Attorney General of the State of New York until the day he appeared to take the oath of office in the Senate.(5) Mr. Javits waived his congressional salary for the period prior to his taking of the oath.(6)

§ 13.2 The House passed a bill denying extra compensation

1. The Supreme Court dismissed an appeal from one such state court case which held that the state could require a candidate to resign from a sheriff position before entering the race. *State ex rel. Davis* v *Adams*, 238 So.2d 415 (Fla. 1970), stay granted, 400 U.S. 1203 (J. Black in Chambers) (1970), appeal dismissed, 400 U.S. 986 (1970).
2. See 6 Cannon's Precedents § 65 and 1 Hinds' Precedents § 563.
3. Although the Constitution is silent on Members of Congress holding high state offices, the House has ruled that such an office is incompatible with congressional membership (see 6 Cannon's Precedents § 65).

   Numerous cases of Members-elect holding incompatible offices have produced, after much discussion, the principle that a Member-elect or contestant to a seat may continue to hold such office until he is actually sworn and seated in the House, since a Member-elect does not yet have the status of a "Member" under U.S. Const. art. I, § 6, clause 2. See 1 Hinds' Precedents §§ 184, 492–505.
4. 103 CONG. REC. 340, 85th Cong. 1st Sess.
5. *Biographical Directory of the American Congress 1774–1971*, S. Doc. No. 92–8 pp. 1183, 1184, 92d Cong. 1st Sess. (1971).
6. *Senate Manual* § 863 (1971).

for any Member appointed as a United Nations representative to avoid the prohibition against holding incompatible offices.[7]

On Dec. 18, 1945, the House was considering a proposed bill to provide for the participation of the United States in the United Nations.[8] A committee amendment was offered to the bill, denying compensation for the position of representative to the United Nations for any Member of the Senate or House of Representatives who might be designated as such representative; the amendment had: been drafted in order to avoid the possible conflict of a Member holding an incompatible office with compensation, under article I, section 6, clause 2, of the Constitution.[9]

Before the House agreed to the amendment denying compensation to a Member,[10] Mr. Sol Bloom, of New York, explained that the amendment would not preclude a Member of the House or Senate appointed as representative to the United Nations from receiving an expense allowance for duties connected with the office.[11]

§ 13.3 A Member who had been accepted and confirmed as a new federal district judge submitted his congressional resignation to the governor of his state approximately three months prior to the effective date of that resignation.

On Oct. 2, 1963,[12] the Speaker laid before the House the resignation of Mr. Homer Thornberry, of Texas, to take effect on the 20th day of December 1963.

Parliamentarian's Note: Mr. Thornberry had been nominated

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7. For an instance where a Member of the House resigned to accept an appointment as a member of the U.S. delegation to the United Nations, see 111 CONG. REC. 25342, 89th Cong. 1st Sess., Sept. 28, 1965.

In the 88th Congress, S. Res. 142 was introduced and referred to committee, to inquire whether simultaneous service as a Senator and as a United Nations delegate violated the incompatibility provision. See 109 CONG. REC. 8843, 88th Cong. 1st Sess., May 16, 1963. No action was taken on the resolution.

8. 91 CONG. REC. 12267, 79th Cong. 1st Sess.

9. See H. REPT. NO. 1383, 79th Cong. 1st Sess. By removing compensation for the position, if held by a Member, the amendment removed the office from the Supreme Court's definition of an incompatible office, a "term (which) embraces the ideas of tenure, duration, emoluments, and duties." *U.S.* v *Hartwell*, 73 U.S. 385, 393 (1868).

10. 91 CONG. REC. 12286, 79th Cong. 1st Sess.

11. 91 CONG. REC. 12281, 79th Cong. 1st Sess.

12. 109 CONG REC. 18583, 88th Cong. 1st Sess.

on July 9, 1963, to be a federal district judge, and confirmed by the Senate on July 15, 1963. Mr. Thornberry withheld the effective date of his resignation because of the press of business in Congress and also because a special election had been scheduled for Dec. 9, 1963, in Texas.

Appointment to Civil Office

§ 13.4 The nomination of a Senator as a Justice to the Supreme Court was confirmed by the Senate in the 75th Congress, despite constitutional challenges that a new retirement provision had increased the emoluments and positions for Supreme Court Justices, and that the Senator could not be appointed without violating U.S. Constitution article I, section 6, clause 2.[13]

On Aug. 12, 1937, the President submitted to the Senate the nomination of Hugo Black, then Senator from Alabama, to be an Associate Justice of the Supreme Court.[14]

On Aug. 16, 1937, Senator Wallace H. White, Jr., of Maine, arose to state his intention to oppose the nomination of Senator Black, on the ground that Senator Black's appointment would violate article I, section 6, clause 2, of the Constitution, prohibiting the appointment of a Member of Congress to a civil office which shall have been created or the emoluments of which shall have been increased during the time for which he was elected.[15]

Senator White based his challenge on the Retirement Act of Mar. 1, 1937:

> Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 260 of the Judicial Code.

Senator White stated that the act had given to a Justice the new financial emolument of retirement with a salary that could not be diminished by taxation or by other means, as well as the emoluments of the certainty of unlimited compensation and the privilege of voluntary judicial service while a retired Justice.[16] On the same day, Senator Frederick Steiwer, of Oregon, arose to state that he

13. A private citizen sought Supreme Court review of the appointment of the Senator, alleging violation of art. I, § 6, clause 2, but was denied standing in *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam).

14. 81 CONG. REC. 8732, 75th Cong. 1st Sess.

15. *Id.* at pp. 8951–58.

16. *Id.* at p. 8954.

shared Senator White's opinion, and added that not only had the emoluments been increased, but also an entirely new civil office had been created, by adding an "inactive retired Justice" to the Court.(17)

On Aug. 17, 1937, Senator Black's nomination was reported favorably to the Senate, and extensive debate ensued on the constitutional challenge, as stated in part by Senator Edward R. Burke, of Nebraska:

> I . . . say with respect to the matter of eligibility, that a new office was created, and our colleague cannot be boosted into that new office until the term for which he was elected has expired. But even beyond all that, as clear as the English language can express it, the Retirement Act of March 1, 1937, increases the emoluments of the office of Justice of the Supreme Court, and the provisions of the Constitution prohibit any Senator during the term for which he was elected from ascending to that office.(18)

Senator Tom T. Connally, of Texas, arose to support the nomination and to state that the Retirement Act had in no way created a new office or added to the emoluments of Supreme Court Justices.(19)

The Senate rejected the constitutional challenge to Senator Black's nomination, and confirmed his appointment.(20)

§ 13.5 A Member resigned from the House, his resignation to be effective on the day of transmittal, in order to avoid the constitutional prohibition against being appointed to a civil office under the United States of which the salary shall have been increased during the time for which the Member was elected.(1)

On Feb. 27, 1969,(2) Mr. James F. Battin, of Montana, notified the House that he had submitted his

17. *Id.* at p. 8961.

18. 81 CONG. REC. 9077, 75th Cong. 1st Sess. The debate extends at 81 CONG. REC. from 9068 to 9103.

19. *Id.* at pp. 9082–88.

20. *Id.* at p. 9103. For the view of a commentator that the constitutional prohibition was not violated in Senator Black's case, see Corwin, *The Constitution of the United States of America: Analysis and Interpretation,* p. 101 (1953).

1. The constitutional provision has been interpreted to mean that the critical time, as to when the appointment is effective, is when the President signs the certificate of appointment, following Senate confirmation. See *In re Accounts of Honorable Matt W. Ransom, For Compensation as Envoy to Mexico, Decisions of the Comptroller of the Treasury,* Vol. 2, p. 129, dated Sept. 6, 1895.

2. 115 CONG. REC. 4734, 91st Cong. 1st Sess.

resignation as a Member to the Governor of his state, to be effective at 3:30 p.m. on the day of transmittal. At that precise hour he was sworn in as a United States district judge, which appointment had been confirmed by the Senate on Feb. 25, 1969.

Mr. Battin resigned at the time he did and took the oath of judge at the hour of 3 :30 p.m. on Feb. 27 in order to assume office before Mar. 1, which would have been the effective date of a judicial pay raise enacted by the Congress.[3] Mr. Battin therefore avoided violating the constitutional prohibition against a Member of Congress being appointed to a civil office whose emoluments had been increased during the Member's term.

§ 13.6 The Senate confirmed the appointment of a Member of the House to a cabinet office where at the time of appointment there was a possibility, but not a certainty, that a proposed salary increase for the position could receive final approval at a future date.

On Jan. 20, 1969, the Senate confirmed without discussion the nomination of Mr. Melvin R. Laird, of Wisconsin, then a Member of the House, as Secretary of Defense.[4] Mr. Laird resigned his House membership on Jan. 23, 1969.[5]

During Mr. Laird's prior term as a Member of the House, Congress had enacted the Federal Salary Act of 1967, which provided for a salary commission to make recommendations to the President on proposed increases for executive, legislative, and judicial salaries, and for the President to embody those recommendations in his next proposed budget to Congress.[6]

Under that act, proposed salary increases for cabinet officials and others were pending before Congress when Mr. Laird was nominated and confirmed as Secretary of Defense.[7]

3. The judicial pay raise was effectuated by Pub. L. No. 90–206, 81 Stat. 642, codified as 2 USC §§ 351–361, which created a commission to recommend salary increases to the President, who would then embody those recommendations in his budget request. For the President's proposed 1969 salary increases, see note to 2 USCA § 356.

4. 115 CONG. REC. 1294, 91st Cong. 1st Sess.

5. 115 CONG. REC. 1571, 91st Cong. 1st Sess.

6. Pub. L. No. 90–206, 81 Stat. 642, codified as 2 USC §§ 351–361.

7. See note following 2 USCA § 358. The proposed increases were submitted to Congress on Jan. 15, 1969.

The Attorney General of the United States had advised Mr. Laird, in an opinion dated Jan. 3, 1969, that article I, section 6, clause 2 of the Constitution did not prohibit the appointment of a legislator to an office when at the time of his appointment it was possible but not certain that a proposed salary increase for that office could receive final approval at a future date.(8)

§ 13.7 In the 93d Congress, a bill was passed decreasing the salary for the position of Attorney General of the United States, in order that Senator could be nominated to the position without violating article I, section 6, clause 2 of the United States Constitution.

On Dec. 10, 1973, the President signed into law Public Law 93–178, 87 Stat. 697, which read in part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the compensation and other emoluments attached to the Office of Attorney General shall be those which were in effect on January 1, 1969, notwithstanding the provisions of the salary recommendations for 1969 increases transmitted to the Congress on January 15, 1969, and notwithstanding any other provision of law, or provision which has the force and effect of law, which is enacted or becomes effective during the period from noon, January 3, 1969, through noon, January 2, 1975.(9)

The decrease in the salary for Attorney General was necessary in order to avoid violating article I, section 6, clause 2 of the Constitution, which provides that no Senator or Representative shall, during the time for which elected, be appointed to a civil office, the emoluments of which shall have been increased during such time. The President had nominated Senator William B. Saxbe, of Ohio, as Attorney General, and the salary for the position had been increased during his term as a Senator.

§ 14. —Military Service

Early Congresses determined that active duty with the United States Armed Forces was incompatible with congressional membership.(10) On many occasions, the House has declared or assumed vacant the seats of Members who have accepted officers' commissions in branches of the

8. See 42 Op. Atty Gen. 36.

9. 119 CONG. REC. 40266, 93d Cong. 1st Sess., Dec. 7, 1973.

10. See 1 Hinds' Precedents §§ 486–492, 494, 500, 504.

armed forces.(11) The practice has not, however, been uniform, and on some occasions involving the military service of Members the House has taken no action.(12)

During and immediately prior to World War II, the House permitted Members to hold officers' commissions, to attend training while the House was in session, and to be absent from House proceedings for military duties.(13) But when the President during the war took action to compel congressional Members to make an election between serving in the Congress and serving in the military,(14) some Members returned to the House and others resigned or otherwise left Congress in order to serve in the armed forces.(15) Congressional salary was not paid to those Members absent during World War II for military service.(16)

An unresolved issue relating to incompatible offices and military service is the status of Members of Congress who hold reserve commissions in branches of the armed forces. Congress has declined on several occasions to finally determine whether active service with the reserves is an incompatible office under the United States.(17) In 1965, however, the Department of Defense stripped all Members of Congress and some congressional employees of their active reserve status.(18)

Service in Armed Forces Reserves

§ 14.1 A Senate resolution introduced in the 88th Con-

11. See, for example, 1 Hinds' Precedents §§ 486, 488, 490.

12. 40 Op. Att'y Gen. 301 (1943). "Under the practice which has long prevailed, Members of Congress may enter the Armed Forces by enlistment, commission, or otherwise but thereupon cease to be Members of Congress provided the House or the Senate, as the case may be, chooses to act."

13. See §§ 14.4, 14.5, infra.

14. See § 14.3, infra.

15. See § 14.6, infra.

16. See § 14.7, infra.

Subsequent to World War I, the House passed a resolution authorizing the back-payment of salaries to Members who had been absent for military service (see 6 Cannon's Precedents § 61).

17. See § 14.1, infra, and 6 Cannon's Precedents §§ 60–62.

18. See § 14.2, infra.

Where a federal court held that a Member of Congress could not hold a commission in the armed forces reserve under art. I, § 6, clause 2, the Supreme Court reversed on grounds relating to the plaintiff's lack of standing to maintain the suit. *Reservists' Committee to Stop the War* v *Laird*, 323 F Supp 833 (1972), aff'd 595 F2d 1075 (1972), rev'd on other grounds 418 U.S. 208 (1974).

gress, to effectuate an inquiry into the possible incompatibility between serving simultaneously in the armed forces reserves and in the Congress, was not acted upon by committee or by the full Senate.

On May 15, 1963, Senator Barry Goldwater, of Arizona, introduced Senate Resolution No. 142, "to make inquiry whether the holding by a Member of the Senate of a Commission as a Reserve member of any of the armed forces is incompatible with his office as Senator"; the resolution was referred to the Committee on the Judiciary.[19] Senator Goldwater introduced the resolution in order to have the Congress finally settle an issue which had never been determined.[20]

On July 24, 1963, Senator Goldwater arose to state that the Committee on the Judiciary had yet failed to take any action on the resolution.[1] He stated that since the committee was failing to act, he was independently investigating the issue, with the conclusion that reserve commissions were not incompatible offices. He reviewed the legislative history of an Act of July 1, 1930, which he said supported his view that service in the reserves was not incompatible with service as a Senator.

§ 14.2 A Senator proposed and then withdrew an amendment in the 89th Congress to block a Defense Department order which deactivated Congressmen then serving in the active reserves.

On Apr. 6, 1965, during Senate debate on a military procurement authorization bill, Senator Howard W. Cannon, of Nevada, offered an amendment to counteract a Department of Defense directive of Jan. 16, 1965, No. 1200.7, which had ordered all Members of Congress out of the Active Reserve and into the Standby or Retired Reserve.[2]

Senator Cannon stated the reason for his amendment as follows:

> With reference to Members of the legislative branch who also may be

19. 109 CONG. REC. 8764, 88th Cong. 1st Sess.

20. See Senator Goldwater's explanation of the resolution and analysis of historical developments at 109 CONG. REC. 8715–18, 88th Cong. 1st Sess., May 15, 1963.

The resolution was amended on May 15 to include studying the incompatibility of a Senator serving on the United Nations delegation. 109 CONG. REC. 8843.

1. 109 CONG. REC. 13211, 88th Cong. 1st Sess.

2. 111 CONG. REC. 7097, 89th Cong. 1st Sess.

> members or former members of the Ready Reserve, their requirements for military service should be the subject of a Presidential determination, as they were in World War II. The premise underlying the Defense Department order is in error; namely, that a Member of the Senate or the House of Representatives . . . is unfit not only to serve in the Ready Reserve, but also to decide for himself whether he can best serve his country at a time of national crisis as a legislator or as a member of the Armed Forces on active duty.

Senator Cannon later withdrew his amendment, upon assurance his objection would be considered by the committee handling the bill.[3]

Action of Executive Branch

§ 14.3 During World War II, the President recalled to Congress Members then serving in the armed forces, after the Department of War and the Department of the Navy stated their opposition to such simultaneous service.

On June 1, 1942,[4] there were inserted in the Record letters written by Secretary of War, Henry I. Stimpson, and Secretary of the Navy, Frank Knox, addressed to the Speaker of the House, opposing the enlistment or commissioning of Members of Congress in the armed forces and stating that a Member of Congress could render greater services to the Nation by continuing to represent the people rather than by serving with the armed forces.

The letters stated that activation of Members who held reserve commissions would be discouraged, and applications for enlistment by Members would be disapproved.

During 1942, the President began recalling to Congress those Members presently absent on active military service.[5]

In 1943, the Attorney General advised the President as follows:

> It would be a sound and reasonable policy for the Executive Department to refrain from commissioning or otherwise utilizing the services of Members of Congress in the armed forces, and the Congress by exemptions in the Selective Training and Service Act of 1940 has recognized the soundness of this policy.[6]

3. *Id.* at p. 7101.

4. 88 CONG. REC. A–2015, 77th Cong. 2d Sess.

5. See, for example, the remarks of Mr. Albert L. Vreeland (N.J.) on July 30, 1942, 88 CONG. REC. A–2993, 77th Cong. 2d Sess.

6. 40 Op. Att'y Gen. 301 (1943). The opinion stated that both the House and the Senate had, on some occasions in the past, determined that service with the armed forces was incompatible with congressional membership.

World War II Service

§ 14.4 During and immediately prior to World War II, Members were allowed to hold officers' commissions and to attend military training while the House was in session.

On June 10, 1941,[7] the House granted a leave of absence to Mr. James G. Scrugham, of Nevada, presently a lieutenant colonel in the Officers Reserve Corps, to attend three weeks of military training.

Similarly, on Oct. 23, 1941,[8] the House granted by unanimous consent indefinite leave of absence to Mr. Dave E. Satterfield, Jr., of Virginia, for temporary active duty as an officer in the Naval Reserve.

§ 14.5 During World War II, no objections were voiced to the absence of Members-elect and to the delay in their taking the oath because of overseas duty with the armed forces.

On Jan. 4, 1945,[9] an announcement was made that Mr. Henry J. Latham, of New York, would be delayed in taking the oath until the month of February, since he was presently a lieutenant in the Navy and on duty in the South Pacific. No objection was raised in the House to Mr. Latham's absence.

On Mar. 7, 1945,[10] Mr. Albert A. Gore, of Tennessee, appeared to take the oath of office in the 79th Congress. He had been re-elected to the 79th Congress after resigning his seat in the 78th Congress in order to serve overseas with the armed forces.

§ 14.6 During World War II, after the executive branch had voiced opposition to the simultaneous military service of Members of Congress, some Members resigned their seats, or did not seek re-election, in order to serve with the armed forces.[11]

For the statutory draft deferment of Congressmen referred to, see Selective Training and Service Act of 1940, 54 Stat. 885, Ch. 720, § 5(c)(1).

7. 87 CONG. REC. 4991, 77th Cong. 1st Sess.

8. 87 CONG. REC. 8210, 77th Cong. 1st Sess.

9. 91 CONG. REC. 34, 79th Cong. 1st Sess.

10. 91 CONG. REC. 1859, 79th Cong. 1st Sess.

11. According to Senator Howard W. Cannon (Nev.) in remarks on Apr. 6, 1965, of the 20 Members of Congress who had gone on active duty during World War II before the President determined they should be recalled, 12 either resigned or otherwise left

During World War II, the Departments of the War and Navy stated their opposition to Members of Congress serving in the military, and the President began recalling to Congress Members who were commissioned or had enlisted.(12)

Some Members who were then in the armed services, and some who wished to join, then resigned from the House or did not seek reelection, in order to serve with the armed forces.(13)

§ 14.7 During World War II, the Sergeant at Arms of the House did not disburse compensation to those Members who were presently on leaves of absence and serving in the military.

In accordance with an opinion given him by the Comptroller General, Kenneth Romney, Sergeant at Arms of the House, did not pay congressional salary to those Members of the House who were during World War II on leaves of absence because of service in the Army and Navy.(14)

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the House in order to serve. 111 CONG. REC. 7097, 89th Cong. 1st Sess.

12. See § 14.3, supra.

13. See 90 CONG. REC. 8990, 78th Cong. 2d Sess., Dec. 7, 1944; 90 CONG. REC. 8450, 78th Cong. 2d Sess., Nov. 27, 1944; 90 CONG. REC. 8201, 78th Cong. 2d Sess., Nov. 20, 1944; 89 CONG. REC. 8163, 78th Cong. 1st Sess., Nov. 14, 1943; 89 CONG. REC. 7779, 78th Cong. 1st Sess., Sept. 23, 1943; and 88 CONG. REC. 7051, 77th Cong. 2d Sess., Sept. 7, 1942.

14. See H. REPT. NO. 2037, from the Committee on House Accounts, to accompany H. Res. 512, 79th Cong. 2d Sess.

D. IMMUNITIES OF MEMBERS AND AIDES

§ 15. Generally; Judicial Review

The Constitution grants to Members of Congress two specific immunities, one from arrest in certain instances and one from being questioned in any other place for speech or debate.[15] Viewed in one form, they constitute legal defenses, to be pleaded in court, which act to prohibit or limit court actions or inquiries directed against Members of Congress.[16] Since the immunities act as procedural defenses, it has become the role of the courts, both state and federal, to define and clarify their application to ongoing cases and controversies. The courts have even stated on occasion that the scope and application of the immunities is not for Congress but for the judiciary to decide.[17]

The immunities exist not only to protect individual legislators, but also to insure the independence and integrity of the legislative branch in relation to the executive and judicial branches.[18] The principle of separation of powers is so essential to the American constitutional framework that the general immunity of Congress, of its components, and of its actions from interference by the other branches of the government, may be said to exist independently of the express constitutional immunities.[19]

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15. U.S. Const. art. I, § 6, clause 1.

16. *Smith* v *Crown Publishers,* 14 F.R.D. 514 (1953).

17. See *Gravel* v *U.S.*, 408 U.S. 606, 624 and note 15 (1972).

18. "The immunities of the Speech or Debate Clause were not written in the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *U.S.* v *Brewster,* 408 U.S. 501, 507 (1972).

19. In *Tenney* v *Brandhove,* 341 U.S. 367 (1951), the Supreme Court stated that the constitutional immunities for Members of Congress were a reflection of political principles already firmly established in the states. The Court concluded on the basis of public policy and of common law legislative privilege that state legislatures were protected from civil liability for conducting investigations.

See *Methodist Federation for Social Action* v *Eastland,* 141 F Supp 729 (D.D.C. 1956), wherein the court relied upon separation of powers in refusing to enjoin the printing of a committee report. The court stated that "nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not, whether it is defamatory

The specific immunities of Congressmen from arrest and for speech and debate are easily confused with various uses of the term "privilege"; that term generally refers to the immunity of governmental officials and agencies for statements and actions performed in the course of official duties. Not only the executive and judicial branches of the federal government, but also the state legislatures, have been recognized to hold some privilege from suit and inquiry in relation to official acts and duties.(20)

Under the procedure of the House, the term "question of privilege" refers to matters raised on the floor, with a high procedural precedence, and divided into matters of personal privilege (affecting the rights, reputation, and conduct of individual Members in their representative capacity) and into matters of the privilege of the House (affecting the collective safety, dignity, and integrity of legislative proceedings).(1) Alleged violations of the specific constitutional immunities of Members comprise only a part of the many

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or not, and whether it is or is not made after a fair hearing. Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement." In *McGovern* v *Martz,* 182 F Supp 343 (D.D.C. 1960), the court stated that "the immunity [of speech and debate] was believed to be so fundamental that express provisions are found in the Constitution, although scholars have proposed that the privilege exists independently of the constitutional declaration as a necessary principle in free government."

See for a full discussion Reinstein and Silverglate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113 (1973), in which the authors contend that the Speech and Debate Clause must encompass all legitimate functions of a legislature in a system which embraces the principle of separation of powers. See also Comment, The Scope of Immunity for Legislators and Their Employees, 70 Yale L. Jour. 366 (1967).

20. See *Doe* v *McMillan,* 412 U.S. 306 (1973) and *Barr* v *Mateo,* 360 U.S. 564 (1959) for the common law principle that public officials, including Congressmen, judges, and administrative officials, are immune from liability for damages for statements and actions made in the course of their official duties.

For the privilege of state legislators, see *Tenney* v *Brandhove,* 341 U.S. 367 (1951); *Eslnger* v *Thomas,* 340 F Supp 886 (D.S.C. 1972); *Blondes* v *State,* 294 A.2d 661 (Ct. App. Md. 1972).

1. For definitions of questions of privilege and the manner of raising them, see Rule IX, *House Rules and Manual* § 661 (1973) and Ch. 11, infra.

issues which are raised as questions of privilege in the House. Therefore, a distinction must be made between questions of privilege in general and the specific immunities of Members of Congress.(2)

When an incident arises in relation to the immunities of Members, the incident may be brought before the House as a question of privilege,(3) whereupon the House may investigate the situation and may adopt a resolution stating the consensus of the House on whether immunities have been violated, and ordering such actions as the House or the individual Member(s) may take.(4)

Congress held extensive hearings in the 93d Congress on the subject of interference by the judiciary with the legislative process.(5)

2. Questions of privilege must be further distinguished from privileged questions, which are certain questions and motions which have precedence in the order of business under House rules (see Ch. 11, infra).
3. See §§ 15.1, 15.3, infra.
4. See §§ 15.1, 15.2, infra.
5. Constitutional Immunity of Members of Congress, hearings before the Joint Committee on Congressional Operations, 93d Cong. 1st and 2d Sess.

House Procedure When Member Subpenaed or Summoned

§ 15.1 The House determined that a summons issued to a Member to appear and testify before a grand jury while the House is in session, and not to depart from the court without leave, invades the rights and privileges of the House, as based upon the immunities from arrest and from being questioned for any speech or debate in the House.

On Nov. 17, 1941, the House authorized by resolution (H. Res. 340) Mr. Hamilton Fish, Jr., of New York, to appear and testify before a grand jury of the United States Court for the District of Columbia at such time as the House was not sitting in session:(6)

> Whereas Representative Hamilton Fish, a Member of this House from the State of New York, has been summoned to appear as a witness before a grand jury of the United States Court for the District of Columbia to testify: Therefore be it
>
> *Resolved,* That the said Hamilton Fish be, and he is hereby, authorized to appear and testify before the said grand jury at such time as the House is not sitting in session.

6. H. Res. 340, from the Committee on the Judiciary, 87 CONG. REC. 8933, 8934. 77th Cong. 1st Sess.

The authorizing resolution was adopted pursuant to the report of a committee that the service of a summons to a Member to appear and testify before a grand jury while the House is in session does invade the rights and privileges of the House of Representatives, as based on article I, section 6 of the Constitution, providing immunities to Members against arrest and against being questioned for any speech or debate in either House, but that the House could in each case waive its privileges, with or without conditions: (7)

MR. [HATTON W.] SUMNERS of Texas: Mr. Speaker, on behalf of the Committee on the Judiciary I submit a privileged report. . . .

The Committee on the Judiciary, having investigated and considered the matter submitted to it by House Resolution 335, submits the following report:

The resolution authorizing the committee to make this investigation is as follows:

"RESOLUTION

"Whereas Hamilton Fish, a Member of this House from the State of New York, has been summoned to appear as a witness before the grand jury of a United States court for the District of Columbia to testify; and

"Whereas the service of such a process upon a Member of this House during his attendance while the Congress is in session might deprive the district which he represents of his voice and vote; and

"Whereas article I, section 6 of the Constitution of the United States provides:

"'They (the Senators and Representatives) shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same . . . and for any speech or debate in either House they (the Senators and Representatives) shall not be questioned in any other place'; and

"Whereas it appears by reason of the action taken by the said grand jury that the rights and privileges of the House of Representatives may be infringed: Therefore be it

"*Resolved*, That the Committee on the Judiciary of the House of Representatives is authorized and directed to investigate and consider whether the service of a subpena or any other process by a court or a grand jury purporting to command a Member of this House to appear and testify invades the rights and privileges of the House of Representatives. The committee shall report at any time on the matters herein committed to it and that until the committee shall report Representative Hamilton Fish shall refrain from responding to the summons served upon him."

The summons referred to is as follows:

"[Grand jury, District Court of the United States for the District of Columbia. The United States v. John Doe. No. —. Grand jury original, criminal docket. (Grand jury sitting in room 312 at Municipal Building, Fourth and E Streets NW., Washington, D. C.)]

"THE PRESIDENT OF THE UNITED STATES TO HAMILTON FISH:

"You are hereby commanded to attend before the grand jury of said

7. 87 CONG. REC. 8933, 77th Cong. 1st Sess.

court on Wednesday, the 12th day of November 1941, at 10:30 a.m., to testify on behalf of the United States, and not depart the court without leave of the court or district attorney.

"Witness the honorable Chief Justice of said court the — day of ——, 19—.

"CHARLES E. STEWART,
Clerk.
"By M.M. CHESTON,
"Assistant Clerk."

It is the judgment of your committee that the service of this summons does invade the rights and privileges of the House of Representatives.

We respectfully suggest, however, that in each case the House of Representatives may waive its privileges, attaching such conditions to its waiver as it may determine.

The language in the summons "to testify on behalf of the United States, and not depart the court without leave of the court or district attorney" removes any necessity to examine the question as to whether a summons merely to appear and testify is a violation of the privileges of the House of Representatives. This particular summons commands that Representative Hamilton Fish shall not depart the court without leave of the court or district attorney," regardless of his legislative duties as a Member of the House.

It is recognized that this privilege of the House of Representatives referred to is a valuable privilege insuring the opportunity of its Members against outside interference with their attendance upon the discharge of their constitutional duties.

At the same time it is appreciated that there is attached to that privilege the very high duty and responsibility on the part of the House of Representatives to see to it that the privilege is so controlled in its exercise that it not unnecessarily interferes with the discharge of the obligations and responsibilities of the Members of the House as citizens to give testimony before the inquisitorial agencies of government as to facts within their possession.

After the resolution authorizing Mr. Fish to testify was adopted, there ensued debate on the scope of the immunities of Members.[8] The wording of the subpena in question was drawn into issue, since the subpena stated that once the Member appeared to testify he would not be permitted to depart from the court without leave of the court or of the District Attorney. The House determined by the adoption of the resolution that when the Congress is in session it is the duty of the House to prevent a conflict between the duty of a Member to represent his people at its session and his duty as a citizen to give testimony before a court.[9]

Parliamentarian's Note: Summons and subpenas directed to officers, employees, and Members of the House may also involve the doctrine of separation of powers, as for example when calling for documents within the possession and under the control of the House of Representatives or for

8. *Id.* at pp. 8934, 8949–58.

9. H. REPT. NO. 1415, and the remarks of Mr. Emanuel Celler (N.Y.), 87 CONG. REC. 8933, 8935, 8936, 77th Cong. 1st Sess., Nov. 17, 1941.

information obtained in an official capacity.[10]

§ 15.2 The House authorized by resolution the Committee on the Judiciary to file appearances and to provide for the defense of certain Members and employees in legal actions related to their performance of official duties.

On Aug. 1, 1953,[11] the House adopted a resolution authorizing the court appearance of certain Members of the House, named defendants in a private suit alleging damage to plaintiffs by the performance of the defendants' official duties as members of the Committee on Un-American Activities. The resolution also authorized the Committee on the Judiciary to file appearances and to provide counsel and to provide for the defense of those Members and employees. From the contingent fund of the House, travel, subsistence, and legal aid expenses were authorized in connection with that suit.[12]

§ 15.3 Where Members and employees of the House were subpenaed to testify in a private civil suit alleging damage from acts committed in the course of their official duties, the House referred the matter to the Committee on the Judiciary to determine whether the rights of the House were being invaded.

On Mar. 26, 1953,[13] the House was informed of the subpena of members and employees of the Committee on Un-American Activities in a civil suit contending that acts committed in the course of an investigation by the committee had injured the plaintiffs. The House by resolution referred the matter to the Committee on the Judiciary to investigate whether the rights and privileges of the House were being in-

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10. See Ch. 11, infra, for extensive discussion of questions of privileges of the House as related to summons and subpenas.

11. 99 CONG. REC. 10949 10950, 83d Cong. 1st Sess.

12. For an occasion where a Member inserted into the Record a letter to the Committee on Accounts, opposing a request that the House pay an expense incurred by the Chairman of the House Committee on Un-American Activities, in connection with two libel suits brought against the chairman, see 88 CONG. REC. A3035, 77th Cong. 2d Sess., Aug. 6, 1942.

13. 99 CONG. REC. 2356–58, 83d Cong. 1st Sess.

For a more detailed analysis of House procedure when Members, employees, or House papers are subpenaed, see § 18, infra (privilege from arrest) and Ch. 11, infra (privilege in general).

vaded.(14) Mr. Charles A. Halleck, of Indiana, delivered remarks in explanation of the resolution. Referring to the privileges against arrest and against being questioned for speech or debate, he said:

> Through the years that language has been construed to mean more than the speech or statement made here within the four walls of the House of Representatives; it has been construed to include the conduct of Members and their statements in connection with their activities as Members of the House of Representatives. As a result, it seems clear to me that under the provisions of the Constitution itself the adoption of the resolution which was presented is certainly in order.

Mr. John W. McCormack, of Massachusetts, also delivered remarks and stated that "for the House to take any other action would be fraught with danger, for otherwise there is nothing to stop any number of suits being filed against enough Members of the House, and in summoning them, to impair the efficiency of the House of Representatives or the Senate to act and function as legislative bodies." He also stated that the fact that the Members and employees subpenaed were presently in California in the performance of their official duties was immaterial, as they were "out there on official business, and committees of this body are the arms of the House of Representatives." (15)

§ 16. For Speech and Debate

At article I, section 6, clause 1, the Constitution states that "for any speech or debate in either House, they [Senators and Representatives] shall not be questioned in any other place." That prohibition, approved at the Constitutional Convention with little if any discussion or debate,(16) was

14. H. Res. 190, read into the Record at 99 CONG. REC. 2356, 83d Cong. 1st Sess., and adopted *id.* at p. 2358. See § 18.4, infra, for the text of the resolution.

15. The discussion above in the House on the subpena of Members was cited in the case of *Smith* v *Crown Publishers,* 14 F.R.D. 514 (1953).

16. See 5 Elliott's Debates 406 (1836 ea.) and 2 Records of the Federal Convention 246 (Farrand ed. 1911). See also *U.S.* v *Johnson,* 383 U.S. 169 (1966) for the history of the incorporation of the privilege into the United States Constitution, and for the history of the constitutional clause in general.

For the views of early constitutional commentators on the origins and scope of the privilege, see Jefferson's Manual, *House Rules and Manual* §§ 287, 288, 301, 302 (1973) and Story, *Commentaries on the Constitution of the United States,* § 863, Da Capo Press (N. Y. repute. 1970).

drawn directly from the English parliamentary privilege, as embodied in the English Bill of Rights of 1689:

> That the freedom of speech, and debates for proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.[17]

The clause serves not only to insure the independence and unbridled debate of Members of the legislature,[18] but also to reinforce the constitutional doctrine of separation of powers.[19]

As stated above,[20] the scope and application of the immunity for speech and debate has been principally fashioned not by Congress but by the courts. Immunity is usually raised as a defense to litigation challenging the activities of Congressmen or of Congress itself. The Supreme Court has relied heavily upon English parliamentary and judicial precedents in order to resolve issues related to the operation of the immunity in the United States Congress.[1]

For more recent commentary, see Comment, Brewster, Gravel and Legislative Immunity, 73 Col. L. Rev. 125 (1973) (hereinafter cited as 73 Col. L. Rev. 125); Cella, The Doctrine of Legislative Privilege of Freedom of Speech or Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk L. Rev. 1 (1968); Oppenheim, Congressional Free Speech, 8 Loyola L. Rev. 1 (1955); Yankwich, The Immunity of Congressional Speech Its Origin, Meaning and Scope, 99 U. Pa. L. Rev. 960 (1951).

17. 1 W & M, Sess. 2, c. 2, art. 9.

18. The English parliamentary privilege developed from conflict over the right of legislators to speak freely and to criticize the monarchy. See Wittke, The History of the English Parliamentary Privilege, Ohio State Univ. (1921).

Not since 1797, during the administration of John Adams, has the executive branch attempted imprisonment of dissenting Congressmen (see 73 Col. L. Rev. 125, 127, 128). See also § 17.4, infra (Justice Department inquiry, where a Senator obtained and disclosed classified materials).

19. *U.S.* v *Johnson,* 383 U.S. 169, 170 (1966).

"The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *U.S.* v *Brewster,* 408 U.S. 501, 507 (1972). See also *Kilbourn* v *Thompson,* 103 U.S. 168, 203 (1881) and *Coffin* v *Coffin,* 4 Mass. 1, 28 (1808).

20. See § 15, supra.

1. See, for example, *Gravel* v *U.S.,* 408 U.S. 606 (1972); *U.S.* v *Brewster,* 408 U.S. 501 (1972); *U.S.* v *Johnson,* 383 U.S. 169 (1966); *Tenney* v *Brandhove,* 341 U.S. 367 (1951);

The speech and debate that is protected from inquiry either by the judicial branch or by the executive branch includes all things done in a session of the House by one of its Members in relation to the business before it.[2] All speech, debate, and remarks on the floor of the House are privileged,[3] as is material not spoken on the floor of the House but inserted in the Record by a Member with the consent of the House.[4] Republication and unofficial circulation of reprints of the *Congressional Record* are not, however, absolutely privileged, either under American law or under English law.[5] Such reprints enjoy a qualified privilege, so that in a suit for defamation actual malice on the part of the Congressman circulating the reprint would have to be shown.[6]

Kilbourn v *Thompson,* 103 U.S. 165 (1880).

2. *Powell* v *McCormack,* 395 U.S. 486, 502 (1969), quoting from *Kilbourn* v *Thompson,* 103 U.S. 168, 204 (1881).

For the scope of the immunity as to other legislative activities, see § 17, infra.

3. "I will not confine it [the Speech and Debate Clause] to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. . . . And I am satisfied that there are cases in which he [the legislator] is entitled to this privilege when not within the walls of the Representatives' chamber." *Coffin* v *Coffin,* 4 Mass. 1, 27 (1808).

4. See § 16.3, infra.

5. For the English rule on the subject of unofficial reports and reprints, see Story, *Commentaries on the Constitution of the United States,* § 863, Da Capo Press (N.Y. repute. 1970) and 1 Kent's Commentaries 249, note (8th ed. 1854). It should be noted, however, that publication or republication of speeches made on the floor of Parliament was not in itself lawful at the time of the American Constitutional Convention (see 73 Col. L. Rev. 125, 147, 148).

For the American rule, see the cases cited at § 16.3, infra. See also Restatement of Torts §§ 590 and 611, American Law Institute (St. Paul 1938).

6. See Story, *Commentaries on the Constitution of the United States,* § 866 and Restatement of Torts § 590, comment b. See also *New York Times Co.* v *Sullivan,* 376 U.S. 254 (1964) (defamatory statement must have been made either with knowledge that it was false or with reckless disregard as to whether it was false or not); *Murray* v *Brancato,* 290 N.Y. 52, 48 Northeast 2d 257 (1943); *Coleman* v *Newark Morning Ledger Co.,* 29 N.J. 357, 149 A.2d 193 (1959).

In *Trails West, Inc.* v *Wolff,* 32 N.Y. 2d 207 (1973), the New York Court of Appeals held that an allegedly defamatory press release by a Congressman, on a matter of public interest and concern, was entitled to

Protected speech and debate on the floor includes voting records and reasons therefore,[7] introducing bills and resolutions, and passing bills and resolutions.[8] As early as 1810, Chief Justice Marshall refused to inquire into the motives of a state legislature whose Members were allegedly bribed to secure passage of an act.[9]

Controversies relating to the scope of the Speech and Debate Clause have arisen in three different types of court proceedings: (1) criminal charges, principally bribery, against Members in relation to their legislative duties;[10] (2) civil actions for defamation against Congressmen:[11] and (3) litigation claiming private damage from allegedly unconstitutional resolutions and orders of Congress.[12] In the third category is *Kilbourn* v *Thompson,* where false imprisonment by an order of the House was alleged.[13] The Court in that case held that the participation of Members in passing a resolution was protected by the Speech and Debate Clause, although employees of the House charged with the execution of the resolution could be held personally liable for enforcing an unconstitutional congressional act.[14] Since *Kilbourn,* the courts have protected Members from civil liability, citing their speech and debate immunity, but have held congressional employees liable in some cases for executing unconstitutional orders of the House or Senate.[15]

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the qualified privilege enunciated in *New York Times Co.* v *Sullivan.* Since the plaintiff had not proved actual malice, the case was dismissed.

7. *Smith* v *Crown Publishers,* 14 F.R.D. 514 (1953) (oral deposition of Senator limited as to voting record and motives).

8. *Powell* v *McCormack,* 395 U.S. 486 (1969), and *Kilbourn* v *Thompson,* 103 U.S. 165 (1880) (participation of Members in passing resolution protected by Speech and Debate Clause).

9. *Fletcher* v *Peck,* 10 U.S. (6 Cranch) 87, 130 (1810).

10. The bribery case of *U.S.* v *Johnson,* 383 U.S. 169 (1966) was of first impression for the Supreme Court.

11. The House has in the past censured Members for unparliamentary language (see 2 Hinds' Precedents § 1259).

12. For litigation alleging private damage from committee reports and activities, see § 17, infra.

13. 103 U.S. 165 (1880) (imprisonment for contempt of congressional committee).

14. 103 U.S. at 200–205.

15. See, *e.g.,* § 17.1, infra. The naming of congressional employees as defendants in a case seeking a declaratory judgment has been used as a basis for jurisdiction to entertain the suit, when the claim against House Members was dismissed due to the immu-

A similar rule has been followed in cases involving criminal charges against Members of Congress. *United States* v *Johnson* [16] and *Brewster* v *United States* [17] established the principle that a criminal prosecution could not inquire into the motivation, preparation, or content of a Member's speech and that the speech could not be made the basis of a bribery or conspiracy charge. However, a Member may be convicted for accepting a bribe to perform legislative acts, if the prosecution does not inquire into the legislative acts themselves but only into the offering and acceptance of the bribe. And a Member may be convicted of bribery in relation to conduct that is not related to the legislative function.[18]

The Speech and Debate Clause immunity precludes any inquiry into whether remarks were made in the discharge of official duties, or made with malice or ill will. The Supreme Court stated in *Tenney* v *Brandhove:* [19]

> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrence to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even from legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motive.[20]

The immunity of speech and debate would appear to apply to Delegates and Resident Commissioners as well as to Members, because of its purpose of insuring

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nity of speech and debate (see § 16.5, infra).

16. 383 U.S. 169 (1966) (for analysis, see § 16.1, infra).

17. 408 U.S. 501 (1972) (for analysis, see § 16.2, infra).

18. See *Burton* v *U.S.*, 202 U.S. 344 (1906) (conviction of attempt to influence Post Office Department); *May* v *U.S.*, 175 F2d 994 (D.C. Cir. 1949) (conviction of accepting compensation for services before governmental departments).

The Supreme Court has reserved the question whether prosecution of a Congressman, based upon a narrowly drawn statute to regulate congressional conduct, could inquire into legislative acts without violating the Speech and Debate Clause. See *U.S.* v *Johnson*, 383 U.S. 169, 180–185 (1966); *U.S.* v *Brewster*, 408 U.S. 501, 521, 529 (1972).

19. 341 U.S. 367 (1951). *Tenney* involved the immunity of state legislators, which the Court found to be on the same footing as the constitutional privilege. The Court refused to inquire into the motives of a state legislative committee which was allegedly violating the civil rights of a citizen.

20. 341 U.S. at 377.

the independency and integrity of the legislative body in general.[1]

Cross References

Committee reports, activities, and employees protected by the Speech and Debate Clause, see § 17, infra.

Legislative activities protected by the Speech and Debate Clause, see § 17, infra.

Collateral References

Brewster, Gravel and Legislative Immunity, 73 Col. L. Rev. 125 (comment) (1973).

Bribed Congressman's Immunity from Prosecution, 75 Yale L. Jour. 335 (1965).

Cella, The Doctrine of Legislative Privilege of Freedom of Speech or Debate: Its Past, Present and Future as a Part of Criminal Prosecutions in the Courts, 2 Suffolk L. Rev. 1 (1968).

Constitutional Privilege of Legislators: Exemption from Arrest and Action for Defamation, 9 Minn. L. Rev. 442 (comment) (1925).

Defamation—Publication of Defamatory Statements Made by U.S. Senator at Press Conference is Qualifiedly Privileged, 28 Fordham L. Rev. 363 (1959).

Ervin (Senator, N.C.), The Gravel and Brewster Cases: An Assault on Congressional Independence, 59 Va. L. Rev. 175 (Feb. 1973).

Immunity Under the Speech or Debate Clause for Republication and From Questioning About Sources, 71 Mich. L. Rev. 1251 (note) (May 1973).

Oppenheim, Congressional Free Speech, 8 Loyola L. Rev. 1 (1955).

"They Shall Not Be Questioned . . ."—Congressional Privilege to Inflict Verbal Injury, 3 Stan. L. Rev. 486 (comment) (1951).

U.S. v *Johnson*, 337 F2d 180 (4th Cir. 1964), 78 Harv. L. Rev. 1473 (comment) (1965).

United States Constitution Annotated, Library of Congress, S. Doc. No. 92–82, 117–122, 92d Cong. 2d Sess. (1972).

Veeder, Absolute Immunity in Defamation: Legislative and Executive Proceedings, 10 Col. L. Rev. 131 (1910).

Yankwich, The Immunity of Congressional Speech: Its Origin, Meaning and Scope, 99 U. Pa. L. Rev. 960 (1951).

1. In *Doty* v *Strong*, 1 Pinn. 84 (Wis. Territ. 1840), the constitutional privilege from arrest was held applicable to Delegates. Delegates and Resident Commissioners, as governmental officials, have at least the common law privilege from suit enunciated in *Barr* v *Mateo*, 360 U.S. 564 (1959). For the common law privilege in general, see § 15, supra.

As Defense to Bribery or Conspiracy

§ 16.1 The Supreme Court held a Member of the 86th Congress immune from conviction for conspiracy to defraud the government, where the prosecution was based upon a speech made by the Member on the floor of the House.[2]

2. *U.S.* v *Johnson*, 383 U.S. 169 (1966), in which the court affirmed the voidance of the conviction by a United

On June 30, 1960, Mr. Thomas F. Johnson, of Maryland, was recognized under a previous order to speak on the floor of the House. He delivered a speech repudiating critical attacks on the independent savings and loan industry of Maryland.(3)

Mr. Johnson was subsequently indicted and convicted for conspiracy to defraud the United States, among other charges. The conspiracy count was based upon alleged payment to Mr. Johnson to deliver a speech in the House favorable to savings and loan institutions and to influence the Justice Department to dismiss criminal charges against these institutions.(4)

During prosecution of the charges against Mr. Johnson, extensive inquiry was made into the manner of preparation of the June 30 speech, the precise ingredients and phrases of the speech, and the motive in delivering the speech.(5)

The Supreme Court voided the conviction of Mr. Johnson, and held that the Speech and Debate Clause of the Constitution precluded judicial inquiry into the motivation for a Congressman's speech and prevented such a speech from being made the basis of a criminal charge against him for conspiracy to defraud the government.(6)

§ 16.2 The Supreme Court upheld the conviction of a former Senator for accepting bribes to act in a certain way on legislation before his committee, where the prosecution did not require inquiry into legislative acts or motivation.(7)

Where a former United States Senator was indicted for asking

States Court of Appeals, 337 F2d 180 (4th Cir. 1964). The Supreme Court opinion is reprinted at 117 CONG. REC. 32456, 92d Cong. 1st Sess., Sept. 20, 1971.

3. 106 CONG. REC. 15258, 15259, 86th Cong. 2d Sess.

4. See 383 U.S. at 170, 171.

5. See 383 U.S. at 173–177 and notes 4–6.

6. *U.S.* v *Johnson,* 383 U.S. 169, 184, 185 (1966).

7. *U.S.* v *Brewster,* 408 U.S. 501 (1972). The Court overruled the U.S. District Court for the District of Columbia, which had dismissed the indictment on the ground that Senator Brewster was immune from conviction under the Supreme Court's interpretation of the Speech and Debate Clause in *U.S.* v *Johnson,* 383 U.S. 169 (1966) (see § 16.1, supra).

See also *U.S.* v *Dowdy,* 479 F2d 213 (4th Cir. 1973), cert. denied, 414 U.S. 823 (1973), where a United States Court of Appeals found an infringement of the Speech and Debate Clause as to some but not all of the counts of an indictment against a former Member of the House.

and accepting sums of money in exchange for acting a certain way on postage legislation before the Senate Committee on Post Office and Civil Service, of which he was a member, the Supreme Court held that the indictment was a proper one. The Court first stated that there were a variety of legitimate activities of Congressmen, political in nature rather than legislative, which were not protected by the Speech and Debate Clause of the Constitution.(8) The Court then stated:

> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. . . . When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here. . . . And an inquiry into the purpose of the bribe "does not draw into question the legislative acts of the defendant Member of Congress or his motives for performing them."(9)

8. 408 U.S. at 512. Federal courts have used the reasoning of *Brewster* in order to question the use by Congressmen of their franking privilege. In *Hoellen* v *Annunzio,* 468 F2d 522 (7th Cir. 1972), cert. denied, 412 U.S. 953 (1973), the court held that the Speech and Debate Clause did not prohibit inquiry into use of the frank, since the mailings challenged were for political purposes and only incidental to the legislative process. See also *Schiaffo* v *Helstoski,* 350 F Supp 1076 (D.N.J. 1972).

9. 408 U.S. at 526, quoting from *U.S.* v *Johnson,* 383 U.S. 169, 185 (1966).

As Defense to Defamation

§ 16.3 Where a citizen claimed defamation by a Congressman in remarks inserted in the Congressional Record, a federal court held that the Speech and Debate Clause protects material inserted in the Record with the consent of the House, but that republished excerpts are not protected.(10)

10. *McGovern* v *Martz,* 182 F Supp 343 (D.D.C. 1960).

Republication and unofficial circulation of reprints of the *Congressional Record,* if libelous, are not protected by the Speech and Debate Clause. See *Long* v *Ansell,* 69 F2d 386, aff., 293 U.S. 76 (1934) (indicating that circulated reprints of Record would be libel per se if allegations of petition proved) and *Gravel* v *U.S.,* 408 U.S. 606 (1972) (private republication of classified study disclosed at Senate subcommittee hearing not privileged from grand jury inquiry).

If a public official claims to have been libeled by reprints of the *Congressional Record,* it would appear that he would have to prove "actual malice" on the part of the Congressman sought to be sued, under *New York Times Co.* v *Sullivan,* 376 U.S. 254 (1964). A state court held a Congressman qualifiedly privileged from libel for remarks made during a press conference by applying the *Times* rule, in *Trails West, Inc.* v *Wolff,* 32 N.Y. 2d 207, —— N.E. 2d —— (1973).

In the course of a suit by Mr. George S. McGovern, of South Dakota, against a newspaper publisher, for falsely reporting Mr. McGovern as the sponsor of a Communist front organization, the publisher counterclaimed for defamation, based upon a *Congressional Record* insert by Mr. McGovern on Aug. 5, 1958. The insert mentioned the publisher by name.(11)

The United States District Court for the District of Columbia dismissed the counterclaim, holding that a Congressman's constitutional immunity from being questioned for speech and debate extends to all material inserted by him in the *Congressional Record*, with the consent of the House.(12)

The court added that the absolute privilege to inform fellow legislators becomes a qualified privilege when portions of the *Congressional Record* are republished and unofficially disseminated. No allegation of republication had been made in the controversy before the court.(13)

§ 16.4 A federal court dismissed charges of slander against a Senator because the words complained of were delivered in a speech in the Senate Chamber and were protected by the Speech and Debate Clause, despite allegations they were not spoken in discharge of official duties.(14)

On Apr. 12, 1928, Senator James Couzens, of Michigan, delivered a speech on the Senate floor in which he discussed a large additional tax assessment made against him by the Internal Revenue Service when he was a member of a special committee investigating Internal Revenue Service abuses.(15)

In the course of his remarks, Senator Couzens mentioned the name of Mr. Cochran, a former clerk of the Internal Revenue

11. 104 CONG. REC. A–7032, 85th Cong. 2d Sess.

12. 182 F Supp at 347.

13. 182 F Supp at 347, 348.

14. *Cochran* v *Couzens*, 42 F2d 783 (D.C. Cir. 1930), cert. denied, 282 U.S. 874 (1930).

15. 69 CONG. REC. 6253–60, 70th Cong. 1st Sess. Senator Couzens had been appointed on Mar. 24, 1924, to a special committee to investigate the Internal Revenue Service. 66 CONG. REC. 4023.

S. Res. 213, to investigate the tax assessment against Senator Couzens and the threatened intimidation by the Internal Revenue Service, was introduced in the Senate and referred to the Committee on the Judiciary in the 70th Congress. 69 CONG. REC. 7379, 70th Cong. 1st Sess., Apr. 28, 1928.

Service, who Senator Couzens stated had offered him "inside" information of the Service, for a contingent fee, which would enable him to have the assessment voided.(16)

Mr. Cochran subsequently sued Senator Couzens for slander, alleging that the remarks made in the Senate by the Senator were not spoken in discharge of his official duties. A United States Court of Appeals held that Senator Couzens' remarks in the Senate Chamber were absolutely privileged under the Speech and Debate Clause despite that allegation.(17)

Defense to Suit by Excluded Member

§ 16.5 Where a Member-elect excluded from the 90th Congress challenged the exclusion in court and named Members and officers of the House as defendants, the Supreme Court declared the Members immune from suit under the Speech and Debate Clause but upheld the challenge as against the named officers.(18)

On Mar. 1, 1967, the House excluded from membership Member-elect Adam C. Powell, of New York.(19)

Mr. Powell subsequently filed suit in Federal District Court challenging the action of the House in excluding him; he named as defendants the Speaker of the House, certain named Members, and the Clerk, Sergeant at Arms, and Doorkeeper of the House.(20) The defendants as-

16. *Id.* at pp. 6258, 6259. Letters written by and about Mr. Cochran were inserted in the Record *id.* at p. 6259.

17. *Cochran* v *Couzens*, 42 F2d 783 (D.C. Cir. 1930), cert. denied, 282 U.S. 874 (1930).

18. *Powell* v *McCormack*, 395 U.S. 486 (1969). The court affirmed in part and reversed in part the finding of the U.S. Court of Appeals, 395 F2d 577 (D.C. Cir. 1968) and remanded to the U.S. District Court for the District of Columbia.

Portions of the text of the opinion, relating to the Speech and Debate Clause, appear at 117 CONG. REC. 32459, 92d Cong. 1st Sess. For a complete synopsis of the House expulsion proceedings in this case, see § 9.3, supra.

19. 113 CONG. REC. 5038, 90th Cong. 1st Sess. (see H. Res. 278).

20. See the Speaker's announcement that the suit had been filed, 113 CONG. REC. 6035, 90th Cong. 1st Sess., Mar. 9, 1967. Subpenas to the Speaker and others, the complaint in the suit, and application (with memorandum) for the convening of a three-judge federal court were inserted in the Record at 113 CONG. REC. 6036–40.

serted, among other claims, that the Speech and Debate Clause of the Constitution was an absolute bar to Mr. Powell's suit.(1)

When the litigation reached the Supreme Court, the Court held that the Speech and Debate Clause barred suit against the respondent Congressmen but did not bar action against the legislative officials charged with unconstitutional activity.(2)

§ 17. For Legislative Activities

The constitutional clause prohibiting questioning of a Member about any speech or debate in the House is not confined merely to remarks delivered in the Chamber and printed in the *Congressional Record*.(3) As long as legislators are "acting in the sphere of legitimate legislative activity,"(4) they are protected not only from the consequence of litigation but also from the burden of defending themselves.(5) The immunity may also extend to congressional aides and employees where they assist in an integral way in the legislative process.(6) Thus, Members of

See 113 CONG. REC. 8729–62 for further briefs, memoranda, and the opinion of the U.S. District Court Judge dismissing the original complaint.

1. See Point II (A) of Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss in *Powell* v *McCormack* (No. 559–67, U.S. Dist. Ct. for D.C.), reprinted at 113 CONG. REC. 8743–45, 90th Cong. 1st Sess., Apr. 10, 1967.

2. The Court stated that the fact that the House officials were acting pursuant to express orders of the House did not preclude judicial review of the constitutionality of the underlying legislative decision, 395 U.S. at 501–506, and applied the doctrine that, "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts." 395 U.S. at 504.

3. The courts have stated that the protection of the clause, at U.S. Const. art. I, § 6, clause 1, extends to every "act resulting from the nature and in the execution of the office," including an act "not within the walls of the Representatives' chamber," *Coffin* v *Coffin*, 4 Mass. 1, 27 (1808), and to "committee reports, resolutions, and things generally done in a session of the House by one of its Members in relation to the business before it," *Powell* v *McCormack*, 395 U.S. 486, 502 (1969), quoting *Kilbourn* v *Thompson*, 103 U.S. 168, 204 (1881).

4. *Tenney* v *Brandhove*, 341 U.S. 367, 376 (1951).

5. *Dombrowski* v *Eastland*, 387 U.S. 82, 85 (1967); *Powell* v *McCormack*, 395 U.S. 486, 505 (1969).

6. The Supreme Court stated in *Gravel* v *U.S.*, 408 U.S. 606, 616, 617 (1972) (J. White) (analyzed at § 17.4, infra), "that it is literally impossible, in view of the complexities of the modern legislative process . . . for Mem-

the House and certain staff, engaged in legislative activities, are immune in preparing and submitting committee reports, but officials such as the Public Printer may or may not be immune, depending on the legislative necessity of their actions.(7)

The activities of congressional committees when pursuing investigations are absolutely privileged as to Members of Congress.(8)

However, not every legislative activity is protected by the Speech and Debate Clause. Congressmen have been convicted for conspiracy and bribery in relation to activities which, but for the illegal compensation involved, are often undertaken by Congressmen within the scope of their duties.(9) In the 1972 case of *Gravel* v *United States,*(10) the court restricted protected legislative activities to those which are an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or

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bers of Congress to perform their legislative tasks without the help of aides and assistants; that the day to day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego; and that if they are not so recognized, the central role of the Speech and Debate Clause . . . will inevitably be diminished and frustrated." See also *Doe* v *McMillan,* 412 U.S. 306 (1973) for the immunity of committee staff engaged in legitimate legislative acts.

Compare *Kilbourn* v *Thompson,* 103 U.S. 165 (1881), wherein the Sergeant at Arms of the House was held liable for false imprisonment where he executed an unconstitutional resolution.

7. See § 17.1, infra.

8. See the cases noted to § 17.1, infra.

In *Coleman* v *Newark Morning Ledger Co.,* 29 N.J. 357, 149 A.2d 193 (1959) (see case comment, 28 Fordham L. Rev. 363 [1959]), a state court held that a press conference given by a Senator was privileged, where he was acting as the voice of the subcommittee, and informing the public of the results of the investigation. Another state court held in *Hancock* v *Burns,* 158 Cal. App. 2d 785, 333 P.2d 456 (1st Dist. 1958) (see case comment, 11 Stan. L. Rev. 194 [1958]) that a letter sent to a citizen's employer describing him as a security risk was privileged, since the letter was an ordinary means adopted by a state legislative committee to publicize its investigative results.

9. See *Burton* v *U.S.,* 202 U.S. 344 (1906) (intercession before Post Office Department); *May* v *U.S.,* 175 F2d 994 (D.C. Cir. 1949) (services rendered before governmental departments for citizen); *Johnson* v *U.S.,* 383 U.S. 169 (1966) (intercession before Justice Department).

10. 408 U.S. 606 (1972) (see § 17.4, infra).

with respect to other matters which the Constitution places within the jurisdiction of either House."[11] Therefore, a legislative aide to a Congressman could be subpenaed by a grand jury in order to testify about the source of classified government documents and about private arrangements for republication of the documents.[12]

In *Gravel* and in *Brewster* v *United States,* decided in the same term,[13] the court excluded from the protection of the clause those activities it considered only peripheral to legislative activity and essentially political in nature, such as constituent service in general and obtaining and disseminating information in particular.[14]

11. 408 U.S. at 625.

12. See § 17.4, infra.

Compare *McGrain* v *Daugherty,* 273 U.S. 135, 174, 175 (1927): "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which is not infrequently true—recourse must be had to others who do possess it." See also *Hill Parents Ass'n., Inc.* v *Giaimo,* 287 F Supp 98 (D. Conn. 1968) and *Preston* v *Edmundson,* 263 F Supp 370 (N.D. Okla. 1967) (Congressmen acting under color of office when informing public through press releases and television interviews).

13. 408 U.S. 501 (1972)

14. In *Gravel,* 408 U.S. at 627, the court rejected the opinion of the Court of Appeals below, *U.S.* v *Doe,* 455 F2d 753, 760 (1st Cir. 1972), that a common law privilege attached to the official informing role of Congressmen.

In *Brewster,* 408 U.S. at 512, 513, Chief Justice Burger stated for the majority: "It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the court in prior cases." In his dissent, Justice White stated at 557: "Serving constituents is a crucial part of a legislator's duties. Congressmen receive a constant stream of complaints and requests for help or service. Judged by the volume and content of a Congressman's mail, the right to petition is neither theoretical nor ignored. It has never been thought unethical for

Many Congressmen viewed those decisions as posing a threat to the independence of congressional speech and of legislative activities.[15] Congressional hearings have been held on the subject.[16]

a Member of Congress whose performance on the job may determine the success of his next campaign not only to listen to the petitions of interest groups in his state or district, which may come from every conceivable group of people, but also to support or oppose legislation serving or threatening those interests."

15. See Ervin (Senator, N.C.), The Gravel and Brewster Cases: An Assault on Congressional Independence, 59 Va. L. Rev. 175 (1973). Senator Ervin stated *id.* at p. 186 that the Supreme Court's definitions of unprotected political activity reflected a "shocking lack of understanding of the essential elements of the legislative process and the representative role of the legislative branch." James C. Cleveland, Representative from New Hampshire, stated in Legislative Immunity and the Role of the Representative, 14 N.H. Bar Jour. 139 (1973) that the court "had undertaken to threaten gravely the independence of Congress as a coequal branch of government."

See also, for critical commentaries on the decisions, Reinstein and Silverglate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113 (1973); Note, Immunity Under the Speech or Debate Clause for Republication and from Questioning About Sources, 71 Mich. L. Rev. 1251 (1973). Another commentator suggested in Brewster, Gravel and Legislative Immunity, 73 Col. L. Rev. 125, 147, 148 (1973) that the reliance of the court in *Brewster* and in *Gravel* upon English precedents, in order to conclude that republication of congressional materials and dissemination of information was not privileged, was misplaced, since at the time of the English precedents legislators had no responsibility to inform their constituents of governmental activities and policies.

16. Hearings, Constitutional Immunity of Members of Congress (legislative role in gathering and disclosing information), Joint Committee on Congressional Operations, 93d Cong. 1st Sess. (Mar. 1973).

Cross References

Immunity of officers, officials and employees, see Ch. 6, supra.

Collateral References

Absolute Tort Immunity for Legislative Correspondence?, 11 Stan. L. Rev. 194 (Dec. 1958).

Blacklisting Through the Official Publication of Congressional Reports, 81 Yale L. Jour. 188 (Dec. 1971).

Congressional Papers and Judicial Subpoenas, 23 U.C.L.A. L. Rev. 57 (1975).

Defamation—Publication of Defamatory Statements Made by U.S. Senator at Press Conference is Qualifiedly Privileged, 28 Fordham L. Rev. 363 (1959).

Dombrowski v *Eastland*—A Political Compromise and Its Impact, 22 Rutgers L. Rev. 137 (1967).

First Amendment—Congressional Investigations and the Speech or Debate Clause, 40 U. Missouri at Kansas City L. Rev. 108 (1971).

Speech or Debate Clause—Declaratory and Injunctive Relief Against a Congressional Committee, 1970 Wisc. L. Rev. 1216 (1970).

The Scope of Immunity for Legislators and Their Employees, 7 Yale L. Jour. 366 (1967).

United States Constitution Annotated, Library of Congress, S. Doc. No. 9282, 117–122, 92d Cong. 2d Sess. (1972).

Committee Activities, Reports, and Employees

§ 17.1 Where an injunction was sought to restrain the publication of a committee report alleged to defame certain persons identified therein, the Supreme Court held that: (1) members of the committee and stall were immune under the Speech and Debate Clause insofar as engaged in legislative acts in relation to the report; (2) persons with authorization from Congress performing the nonlegislative function of distributing materials infringing on individual rights are not absolutely immune under the clause; and (3) the Public Printer and the Superintendent of Documents were immune under the common-law doctrine of official immunity to the extent they served legitimate legislative functions in publishing and distributing the report.[17]

17. *Doe* v *McMillan,* 412 U.S. 306 (1973).

For further information on the immunity of committee activities and the immunity of committee employees, see *Dombrowski* v *Eastland,* 387 U.S. 82 (1967), *Barsky* v *U.S.,* 167 F2d 241 (1948), and *Stamler* v *Willis,* 415 F2d 1365 (1969), cert. denied, 399 U.S. 929 (1970).

In *Dombrowski,* the Court dismissed an action for damages for conspiracy to seize records unlawfully that had been brought against members of the Senate Internal Security Subcommittee of the Judiciary Committee; the Court stated that since the subject matter of the records was within the subcommittee's jurisdiction, issuance of subpenas to a Louisiana legislative committee to obtain the records was privileged as to subcommittee members. The Court remanded as to a subcommittee employee, whose immunity was not absolute.

In *Barsky,* the court upheld a conviction for willful failure to produce records for the House Committee on Un-American Activities and dismissed the defense of improper committee conduct, since the enabling resolution authorized the inquiry in question, and the inquiry was protected legislative activity.

In *Stamler,* where citizens complained of hindrance of free speech by members and employees of the House Committee on Un-American Activities, the Federal Court of Appeals for the 7th Circuit upheld the

On Feb. 5, 1969, the House passed House Resolution No. 76, authorizing the Committee on the District of Columbia to investigate and report upon the organization, operation, and management of any subdivision of the District of Columbia government.(18) Pursuant to that resolution, the committee prepared and submitted to the House a report, entitled "Investigation and Study of the Public School System of the District of Columbia."

Suit was filed in a federal court by persons named in the report, alleging the report to be defamatory and praying for a declaratory judgment and an injunction against further publication and distribution of the report. The suit named as defendants members of the Committee on the District of Columbia, the clerk, staff director, and counsel of the committee, a consultant and investigator for the committee, the Superintendent of Documents and the Public Printer, officials of the District of Columbia government, and the United States of America. The Federal Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the case, on the grounds that the committee members and their staff were immune from suit under the Speech and Debate Clause and that the Public Printer, Superintendent of Documents and D.C. officials were protected under the doctrine of official immunity (*Barr* v *Mateo,* 360 U.S. 564). The court had been advised that the members of the committee were not in fact seeking further publication or distribution of the report.(19)

The Supreme Court reversed in part, affirmed in part, and remanded to the Court of Appeals. The Court found that the congressional committee members, members of their staff, the committee consultant and the committee investigator were absolutely immune under the Speech and Debate Clause insofar as they were engaged in legislative acts of com-

immunity of committee members from suit, but stated that officials of the committee could be held personally liable for following orders given to them by the legislature. The court stated that it had been clearly established that "liability, including personal tort liability, could be imposed on an official for following orders given to him by the legislature, even though the legislators could not be held personally liable." *Stamler* v *Willis,* 415 F2d 1365, 1368 (7th Cir. 1969), cert. denied, 399 U.S. 929 (1970).

18. 115 CONG. REC. 2784, 91st Cong. 1st Sess.

19. *Doe* v *McMillan,* 459 F2d 1304, 1322 (D.C. Cir. 1972).

piling the report, submitting it to the House, and voting for its publication.[20] Said the Court:

> Without belaboring the matter further, it is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator, for introducing material at Committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report. Doubtless, also, a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries. At least in these respects, the actions upon which petitioners sought to predicate liability were "legislative acts," *Gravel* v *United States,* supra, at 618, and, as such, were immune from suit.[1]

The Court found, however, that other persons acting under the orders of Congress were not absolutely immune under the clause:

> Members of Congress are themselves immune for ordering or voting for a publication going beyond the reasonable requirements of the legislative function, *Kilbourn* v *Thompson, supra,* but the Speech or Debate Clause no more insulates legislative functionaries carrying out such nonlegislative directives than it protected the Sergeant at Arms in *Kilbourn* v. *Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be "without authority." 103 U.S. at 200. See also *Powell* v *McCormack,* 395 U.S., at 504; cf. *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967). The Clause does not protect "criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction." *Gravel* v *United States, supra,* at 622. Neither, we think, does it immunize those who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function.[2]

The Court discussed the common-law principle of official immunity (*Barr* v *Mateo,* 360 U.S. 564) in relation to the Public Printer and Superintendent of Documents:

> We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. See *Dombrowski* v *Eastland,* 387 U.S. 82 (1967). The scope of inquiry becomes equivalent to the inquiry in the context

20. 412 U.S. 306, 311–313.

1. 412 U.S. at 312.

2. 412 U.S. at 315, 316.

of the Speech or Debate Clause, and the answer is the same. The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity," *Tenney* v. *Brandhove,* 341 U.S., at 376, they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen.

Because we think the Court of Appeals applied the immunities of the Speech or Debate Clause and of the doctrine of official immunity too broadly, we must reverse its judgment and remand the case for appropriate further proceedings. We are unaware, from this record, of the extent of the publication and distribution of the report which has taken place to date. Thus, we have little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, have been exceeded. These matters are for the lower courts in the first instance.(3)

§ 17.2 When the Senate and the House in the 84th Congress ordered printed as a Senate document an allegedly libelous committee report, a federal court held that, under the Speech and Debate Clause, it could not enjoin the printing and distribution of the report.(4)

On Jan. 16, 1956, the Senate adopted Senate Concurrent Resolution No. 62, to authorize the printing of a committee report as a Senate document and to authorize the printing of 75,000 additional copies thereof.(5) The report had been issued by the Subcommittee on Internal Security of the Senate Judiciary Committee, and was entitled "The Communist Party of the United States—What It Is—How It Works—a Handbook for Americans."

On Apr. 23, 1956, Senate Concurrent Resolution No. 62 was called up in the House.(6) Mr. Wayne L. Hays, of Ohio, stated in reference to the resolution:

> May I say . . . that this resolution is a Senate resolution and there was quite a good deal of discussion in the committee about it. The House Administration Committee took the position that we had no authority to go behind the Senate resolution and verify the contents of the document. If the other body certified it, it was our belief that we could not go behind the resolution and I would like to read to you just two lines. When the resolution was reported out a motion was made by the gentleman from Ohio [Mr. Schenck], seconded by the gentleman from Louisiana [Mr. Long], and in the motion this language was included:

3. 412 U.S. 324, 325.

4. *Methodist Federation for Social Action* v *Eastland,* 141 F Supp 729 (D.D.C. 1956).

5. 102 CONG. REC. 534, 84th Cong. 2d Sess.

6. 102 CONG. REC. 6777, 84th Cong. 2d Sess.

> This committee takes no responsibility for the contents of this pamphlet, Handbook for Americans. The responsibility rests entirely on the Senate Subcommittee on Internal Security of the Committee on the Judiciary.

The House agreed to the resolution.(7)

Subsequently, the Methodist Federation for Social Action filed suit in federal court seeking to enjoin the release of the committee report, on the ground that the report falsely, defamatorily, and without a hearing, declared that the federation was a Communist front organization.(8)

The court declined to order relief, holding that since the report was ordered printed by the Public Printer and Superintendent of Documents, pursuant to a congressional resolution of both the House and Senate, the court had no power to prevent publication under the Speech and Debate Clause of the Constitution.

§ 17.3 In order to extend the immunity of speech and debate to the printing of a committee report, the House in the 91st Congress authorized by resolution the printing of the report where a federal court had previously enjoined the Public Printer from such printing.

On Dec. 14, 1970, Mr. Richard H. Ichord, of Missouri, offered a resolution (H. Res. 1306) in relation to a report prepared by the Committee on Internal Security, which he chaired.(9) The report (H. Rept. No. 91–1607) was entitled "Limited Survey of Honoraria Given Guest Speakers for Engagements at Colleges and Universities." Various plaintiffs had argued in federal court that the printing of the report should be enjoined, since it acted to hinder the free speech of private citizens. The federal court had enjoined the Public Printer from publishing the report, but had declined to act against the committee or its members, since they were immune under the Speech and Debate Clause of the Constitution.(10)

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7. *Id.* at p. 6778.

8. *Methodist Federation for Social Action* v *Eastland*, 141 F Supp 729 (D.D.C. 1956).

9. 116 CONG. REC. 41355, 91st Cong. 1st Sess.

10. The U.S. District Court of the District of Columbia had held, in *Hentoff* v *Ichord*, 318 F Supp 1175 (D.D.C. 1970), that it could enjoin the Public Printer from publishing the committee report which it found hindered the exercise of free speech by citizens, but that it could not enjoin the committee members from any action, since they could not be questioned for any speech or debate in the House. The opinion of the

Mr. Ichord offered House Resolution No. 1306 by which the House could authorize the printing of the report and thereby prevent the federal court from enjoining its publication.(11) After debate on the resolution, the resolution was agreed to by the House and the committee report was ordered printed.(12)

Disclosure of Classified Material ("Pentagon Papers")—Immunity of Legislative Aide

§ 17.4 Where a Senator convened a subcommittee meeting to read into the record of the meeting portions of a classified Defense Department study ("Pentagon Papers") and then arranged for private republication of the study, an aide who assisted him in those activities was held by the Supreme Court not immune from grand jury questioning.(13)

On the night of June 29, 1971, Senator Gravel, Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a meeting of the subcommittee at which he read extensively from a classified Defense Department study on the history of United States policy during the Vietnam conflict. He then placed the entire 47 volumes of the study in the public record of the committee meeting.(14) He then arranged

court is reprinted at 116 CONG. REC. 41365–68, 91st Cong. 2d Sess., Dec. 14, 1970.

11. See the text of the resolution, *id.* at pp. 41355–57, incorporating the history of the preparation of the report and the history of the court case. See also Mr. Ichord's remarks, *id.* at pp. 41358–64, for his analysis of the constitutional issues involved.

12. *Id.* at p. 41372.

13. *Gravel* v *U.S.*, 408 U.S. 606 (1972). Senator Maurice R. Gravel (Alaska) had intervened to quash grand jury subpenas directed to his aide. The Supreme Court reviewed and modified protective orders issued by a U.S. District Court, *U.S.* v *Doe*, 332 F Supp 930 (D. Mass. 1971) and by a U.S. Court of Appeals, *U.S.* v *Doe*, 455 F2d 753 (1st Cir. 1972), which orders had limited the questions which could be asked of the Senator's aide (Dr. Leonard Rodberg).

14. 408 U.S. at 609. See Senator Gravel's subsequent explanation of his actions at the subcommittee meeting, 117 CONG. REC. 23578, 92d Cong. 1st Sess., July 6, 1971. The text of Senator Gravel's statement made at the subcommittee meeting immediately prior to reading the study was reprinted at 117 CONG. REC. 23723, 92d Cong. 1st Sess., July 7, 1971.

The Supreme Court held, in *New York Times Co.* v *U.S.*, 403 U.S. 713 (1971), that the government could not restrain the press from publishing the study read by Senator Gravel, commonly termed the "Pentagon Papers."

with a private publisher for republication of the text of the study.[15] One of Senator Gravel's aides, Dr. Leonard Rodberg, had assisted Senator Gravel in preparing for and conducting the hearing, and in arranging for private republication of the study.[16]

The Justice Department initiated a grand jury investigation into possible criminal conduct in relation to the reading and republication of the study, and subpenaed Dr. Rodberg to testify before the grand jury.[17]

Senator Gravel intervened in the proceedings in order to quash the subpenas to Dr. Rodberg and others, and in order to require the government to specify the questions to be asked of Dr. Rodberg.[18] A United States District Court[19] and then a United States Court of Appeals[20] issued protective orders restricting the questions which could be asked of Dr. Rodberg.

The Supreme Court agreed with the lower courts' findings that the arrangements for the unofficial publication of the committee record were outside the protection of the Clause, but, contrary to those courts' conclusions, included the Senator and his aide as both vulnerable to questioning and possible liability regarding those arrangements. "While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach," the Court stated, "it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing leg-

15. See 408 U.S. at 609, 610.

16. See 408 U.S. at 609–611.

17. 408 U.S. at 608. See the remarks of Senator Sam Ervin (N.C.) on Sept. 20, 1972, analyzing the Justice Department inquiry and subpenas, and maintaining that the investigation was violating the immunity of Congressmen and their aides for speech and debate and legislative activities, 117 CONG. REC. 32444–49, 92d Cong. 1st Sess. Senator Ervin inserted into the Record relevant court decisions on the Speech and Debate Clause, *id.* at pp. 32449–62 (*Tenney* v *Brandhove,* 341 U.S. 367 [1951]; *Kilbourn* v *Thompson,* 103 U.S. 168 [1880]; *U.S.* v *Johnson,* 383 U.S. 169 [1966]; *Powell* v *McCormack,* 395 U.S. 386 [1969]; *Cochran* v *Couzens,* 42 F2d 783 [1930], cert. denied, 282 U.S. 874 [1930]; *Dombrowski* v *Eastland,* 387 U.S. 82 [1967]).

18. For a compilation of legal motions, letters, affidavits, and orders concerning the subpena to Dr. Rodberg, see 117 CONG. REC. 42752–822, 92d Cong. 1st Sess., Nov. 22, 1971 (extension of remarks of Senator Gravel).

19. *U.S.* v *Doe,* 332 F Supp 930 (D. Mass. 1971).

20. *U.S.* v *Doe,* 455 F2d 753 (1st Cir. 1972).

islative acts.'' The Court found the protective orders to be overly restrictive of the scope of the grand jury inquiry, particularly in not allowing questions relating to the source of the Pentagon documents.[1] The Court held that: (1) the Senator's aide was immune only for legislative acts for which the Senator would be immune;[2] (2) the arrangement for republication of the Defense Department study was not protected under the Speech and Debate Clause;[3] (3) the aide (or the Senator himself) could be questioned by the grand jury about any criminal third-party conduct or republication arrangements where the questions did not implicate legislative action of the Senator.[4]

§ 17.5 The Senate adopted a resolution authorizing payment from its contingent fund of expenses incurred by a Senator as a party in litigation involving the Speech and Debate Clause of the United States Constitution, and providing for the appointment of a select committee to appear as amicus curiae before the United States Supreme Court and to file a brief on behalf of the Senate in the action.

On Mar. 23, 1972,[5] the Senate discussed Senate intervention in the case of *Gravel* v *United States*, involving the Speech and Debate Clause of the Constitution and pending in the Supreme Court of the United States, Senator Maurice R. Gravel, of Alaska, being a party thereto. The Senate adopted Senate Resolution 280 and President pro tempore Allen J. Ellender, of Louisiana, appointed Members of the Senate pursuant to the resolution:

RESOLUTION

Authorizing Senate intervention in the Supreme Court proceedings on the issue of the scope of article I, section 6, the so-called speech and debate clause of the Constitution

Whereas the Supreme Court of the United States on Tuesday, February 22, 1972, issued writs of certiorari in the case of Gravel against United States; and

Whereas this case involves the activities of the junior Senator from Alaska, Mr. Gravel; and

Whereas in deciding this case the Supreme Court will consider the scope and meaning of the protection provided to Members of Congress by article I, section 6, of the United States Constitution, commonly referred to as the

1. 408 U.S. at 626–629.
2. 408 U.S. at 621, 622.
3. 408 U.S. at 622, 625, 626.
4. 408 U.S. at 628, 629.
5. 118 CONG. REC. 9902, 9907, 9915, 9920, 9921, 92d Cong. 2d Sess.

"Speech or Debate" clause, including the application of this provision to Senators, their aides, assistants, and associates, and the types of activity protected; and

Whereas this case necessarily involves the right of the Senate to govern its own internal affairs and to determine the relevancy and propriety of activity and the scope of a Senator's duties under the rules of the Senate and the Constitution; and

Whereas this case therefore concerns the constitutional separation of powers between legislative branch and executive and judicial branches of Government; and

Whereas a decision in this case may impair the constitutional independence and prerogatives of every individual Senator, and of the Senate as a whole; and

Whereas the United States Senate has a responsibility to insure that its interests are properly and completely represented before the Supreme Court: Now, therefore, be it

Resolved, That the President pro tempore of the Senate is hereby authorized to appoint a bipartisan committee of Senators to seek permission to appear as amicus curiae before the Supreme Court and to file a brief on behalf of the United States Senate; and be it further

Resolved, That the members of this bipartisan committee shall be charged with the responsibility to establish limited legal fees for services rendered by outside counsel to the committee, to be paid by the Senate pursuant to these resolutions; be it further

Resolved, That any expenses incurred by the Committee pursuant to these resolutions including the expense incurred by the Junior Senator from Alaska as a party in the above mentioned litigation in printing records and briefs for the Supreme Court shall be paid from the contingent fund of the Senate on vouchers authorized and signed by the President pro tempore of the Senate and approved by the Committee on Rules and Administration; be it further

Resolved, That these resolutions do not express any judgment of the action that precipitated these proceedings; and be it further

Resolved, That the Secretary of the Senate transmit a copy of these resolutions to the Supreme Court.

MR. [MICHAEL J.] MANSFIELD [of Montana]: Mr. President, there are some recommendations relative to the counsel to be appointed from the Democratic side and three associate counsel to assist the chief counsel. Would the Chair make those nominations at this time on behalf of the majority?

THE PRESIDENT PRO TEMPORE: Under the resolution just agreed to, the Chair appoints the Senator from North Carolina (Mr. Ervin) chief counsel, and the Senator from Mississippi (Mr. Eastland), the Senator from Rhode Island (Mr. Pastore), and the Senator from Georgia (Mr. Talmadge) as associate counsel.

THE PRESIDING OFFICER (Mr. Stafford) subsequently stated: The Chair, on behalf of the President pro tempore, under Senate Resolution 280, makes the following appointments to the committee established by that resolution: The Senator from New Hampshire Mr. Cotton), the Senator from Colorado

(Mr. Dominick), the Senator from Maryland (Mr. Mathias), and the Senator from Ohio (Mr. Saxbe).

§ 18. From Arrest

Article I, section 6, clause 1 of the Constitution states of Senators and Representatives that "they shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same."(6) Unlike the Speech and Debate Clause, which was not judicially defined until the 20th century,(7) issues relating to the immunity from arrest were litigated soon after the adoption of the Constitution.(8)

The immunity from arrest has been extensively discussed on the floor of the House, since subpenas, summonses, and arrests of Members while the House is in session are presented to the House as questions of privilege. The House has decided that a summons or subpena to a Member to appear in court, or before a grand jury, while the House is in session invades the rights and privileges of the House.(9) The permission of the House is required for a Member to attend upon a court during sessions of Congress; the House usually by resolution permits

6. See, in general, *House Rules and Manual* § 90 (1973) (comment to the constitutional provision). For Jefferson's comments, see *House Rules and Manual* §§ 287–292, 300–309 (1973). See also, for early commentary, Story, *Commentaries on the Constitution of the United States,* §§ 856–862, Da Capo Press (N. Y. repute. 1970). Story attributed to Congress the power of contempt to punish those who unlawfully arrest Members, *id.* at § 860, but the House has no such general contempt power. See *Kilbourn* v *Thompson,* 103 U.S. 189 (1881) and *Marshall* v *Gordon,* 243 U.S. 521 (1917).

7. See § 16, supra.

8. The first cases on the constitutional privilege were *Coxe* v *M'Clenachen,* 3 Dall. 478 (Sup. Ct. Pa. 1798) and *U.S.* v *Cooper,* 4 Dall. 341 (U.S. Cir. Ct. D. Pa. 1800).

9. See § 18.1, infra.

Subpenas, summonses, and arrests are presented as questions of House privilege and not personal privilege, since they affect the rights of the House collectively, its safety, dignity, and integrity of proceedings. See Rule IX, *House Rules and Manual* § 661 (1973). And resolutions proposing action by the House are called up under a question of the privileges of the House.

The personal privilege of the Member may also be involved, however, since that privilege rests primarily on the constitutional immunities. See *House Rules and Manual* § 663 (1973). For an instance where a grand jury summons was raised as a question of personal privilege, see 6 Cannon's Precedents § 586.

court appearance at such time as the Congress is not actually in session.[10] On most occasions, Representatives and Senators seek accommodation between their duty to appear in court and their duty to attend upon the sessions of Congress,[11] since the purpose of the clause is not for the benefit or convenience of individual legislators but is to prevent interference with the legislative process by the courts and by grand juries.[12]

The Constitutional Convention adopted a privilege from arrest with substantially the same scope as the English parliamentary privilege.[13] Under the common law, the privilege did not apply to any indictable offenses.[14] The words "treason, felony, and breach of the peace" have been construed by the Supreme Court to remove from the operation of the privilege all criminal offenses.[15] Criminal offenses are those in which fine and/or imprisonment are imposed as punishment.[16] Therefore, the immunity applies only to arrest in civil cases, which was a common procedure at the time of the Constitutional Convention.[17] Since

10. See Ch. 11, infra.

11. See §§ 18.1, 18.3, 18.5, infra.

12. See *U.S.* v *Brewster,* 408 U.S. 501, 507 (1972); *James* v *Powell,* 274 N.Y.S. 2d 192, 26 App. Div. 2d 295 (1966); *U.S.* v *Cooper,* 4 Dall. 341 (U.S. Cir. Ct. D. Pa. 1800).

13. Although the parliamentary privilege from arrest may date from the sixth century, the first legislative recognition appeared in 1603 in the statute of 1 James I, C. 13. See Taswell-Longmead, *English Constitutional History,* 324–332 and note 5 (2d ed. 1881).

The arrest immunity, like the speech and debate immunity, was included in the U.S. Constitution with little debate or discussion. See vol. 2, *Records of the Federal Convention* 140, 141, 156, 166, 180, 246, 254, 256, 267, 567, 593, 645; vol. 3, 148, 312, 384; vol. 4, 40–43 (Farrand ed. 1911).

14. Story, *Commentaries on the Constitution of the United States,* § 862, Da Capo Press (N.Y. repute. 1970); *Williamson* v *U.S.,* 207 U.S. 425 (1908).

15. *Williamson* v *U.S.,* 207 U.S. 425 (1908). The Court relied on parliamentary precedents, and upon the meaning of the clause at the time of the Constitutional Convention.

16. See 21 Am Jur 2d Criminal Law 1.

17. *Long* v *Ansell,* 293 U.S. 76, 82 (1934) noted that "when the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies."

For an early case where a Member had been arrested in a civil suit and released on bail, and his surety agreed to surrender him four days after the close of the congressional session, see *Coxe* v *M'Clenachen,* 3 Dall. 478 (Sup. Ct. Pa. 1798).

arrests seldom attach in contemporary practice to civil suits, the clause has been described as virtually obsolete.[18]

Questions have arisen, however, whether subpenas and summonses directed to Members of Congress, either as defendants in court cases, or as witnesses in civil and in criminal cases, constitute prohibited arrest. The rulings of the courts, both state and federal, have uniformly expressed the principle that a summons or subpena is not an arrest, and is not precluded by the Constitution.[19]

Likewise, a Senator or Representative is not exempt from service of civil process and attachment of a bank account,[20] may not have a civil suit postponed as a matter of right,[1] and is not immune from orders relating to the taking of a deposition.[2]

The courts have recognized, however, that Congressmen sought to be summoned or subpenaed have a duty to be present at the sessions of Congress. Therefore, Congressmen have been allowed to accommodate their court appearance with their congressional duties.[3]

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18. See U.S. Constitution Annotated, Library of Congress, S. Doc. No. 92–82, p. 117, 92d Cong. 2d Sess. (1972).

19. "Senator Long [served with summons as defendant in civil suit for libel] contends that article I, section 6, clause 1 of the Constitution, confers upon every Member of Congress, while in attendance within the District, immunity in civil cases not only from arrest, but also from service of process. Neither the Senate, nor the House of Representatives, has ever asserted such a claim in behalf of its Members. Clause 1 defines the extent of the immunity. Its language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant." *Long* v *Ansell,* 293 U.S. 76, 82 (1934).

For other cases holding that Congressmen named as parties in civil cases are not immune from summonses and service of process, see § 18.4, infra.

For cases holding that Congressmen are not immune from grand jury subpenas, to testify as witnesses, see §§ 18.1, 18.2, infra.

For cases holding that Congressmen are not immune from subpenas to testify as witnesses in criminal cases, when called either by the defendant or by the government, see § 18.3, infra.

20. *Howard* v *Citizen Bank & Trust Co.,* 12 App. D.C. 222 (1898).

1. *Nones* v *Edsall,* 1 Wall. 189, 18 F. Cases No. 10, 290 (U.S. Cir. Ct. D.N.J. 1848). The court did grant the continuance as a matter of judicial discretion.

2. *Yuma Greyhound Park, Inc.* v *Hardy,* 472 P.2d 47 (Ariz. 1970).

3. In *James* v *Powell,* 274 N.Y.S. 2d 192, 26 App. Div. 2d 295 (1966), the court stated in reference to subpenas

In at least one case, a Member who did not seek such accommodation was adjudged after the close of the session in contempt and ordered fined and imprisoned.(4)

If a Member were to be arrested in a civil suit during a session of Congress, Congress could free him through a writ of habeas corpus.(5)

The immunity from arrest applies not only while Congress is in session, but also while a Member is en route to or from the session. The time spent traveling must be a reasonable time, and the journey must not be abandoned through substantial deviations.(6) If a Member-elect with credentials travels to a session,(7) and is de-

served upon Members that where actual interference with the legislative process is shown the courts will make suitable provision by way of adjournment or fixing of a time and place of examination which will obviate any real conflict.

In *U.S.* v *Cooper,* 4 U.S. (4 Dall.) 341 (U.S. Cir. Ct. D. Pa. 1800) the court stated that Members were not exempt from a subpena to testify in a criminal case, but that nonattendance would not necessarily result in an attachment for arrest. A satisfactory reason could appear to the court to excuse attendance.

In *Respublica* v *Duane,* 4 Yeates 347 (Sup. Ct. Pa. 1807), the court refused an attachment against Members for not obeying a subpena, where it was alleged they were not in attendance upon Congress. The court stated that a reasonable time to respond must be given, and that the failure of a Member to attend upon sessions must be proved.

4. See *James* v *Powell,* 274 N.Y.S. 2d 192, 26 App. Div. 2d 295 (1966), aff'd, 277 N.Y.S. 2d 135, 18 N.Y. 2d 931, 223 N.E. 2d 562 (1966), motion to modify order granted, 279 N.Y.S. 2d 972, 19 N.Y. 2d 813, 226 N.E. 2d 705 (1967). The court stated that interference with the duties of congressional attendance had neither been alleged nor shown. The order for appearance later became mooted in the case.

An attachment during a session for willful failure to obey a subpena might involve a civil arrest, prohibited by the immunity from arrest. See 6 Cannon's Precedents § 588.

5. Jefferson's Manual, *House Rules and Manual* § 288 (1973). On one occasion an arrested Member was freed by a House officer (see 3 Hinds' Precedents § 2676).

6. See *Hoppin* v *Jenckes,* 8 R.I. 453 (1867) (court stated that 40 days before and after session was unreasonably long); *Lewis* v *Elmendorf,* 2 Johnson's Cases 222 (Sup. Ct. N.Y. 1801) (arrest upheld, Member 10 days en route after leaving home); *Miner* v *Markham,* 28 F 387 (E.D. Wisc. 1886) (deviation to Milwaukee, while traveling from California to Washington, D.C., allowable).

For commentary on a reasonable time for travel and unallowable deviations while in transit, see Jefferson's Manual, *House Rules and Manual* § 289 (1973).

7. Jefferson's Manual states that the privilege from arrest takes place by

nied a seat because of an election contest, he is entitled to the privilege until a reasonable time for his journey home has elapsed.(8) Several state court decisions have held that if a Member of Congress is absent from a session and his absence is not for official but for private business, the privilege does not apply to him.(9)

Delegates and Resident Commissioners are entitled to the immunity as well as Members.(10)

Collateral References

Congressional Immunity from Arrest, 70 U.S. L. Rev. 306 (June 1936).

Constitutional Privilege of Legislators: Exemption from Arrest and Action for Defamation, 9 Minn. L. Rev. 442 (1925).

Legislative Immunity, Arrest Under Motor Vehicle Code, Limits of the Legislative Immunity, 7 U. Pitt. L. Rev. 486 (1951).

Redfield, The Immunities of Congress from Process, 10 Geo. Wash. L. Rev. 513 (Mar. 1942).

Whether a Member of Congress may, during a session of Congress, be subpenaed as a witness in judicial proceedings (Memo of Legislative Counsel, U.S. Senate), 103 CONG. REC. 4203–05, 85th Cong. 1st Sess., Mar. 22, 1957.

force of election. *House Rules and Manual* § 300 (1973).

8. *Dunton & Co.* v *Halstead,* 2 Clark 236 (Diet. Ct. Phil. 1840) (after loss of seat, excluded Member-elect delayed departure from Washington pending granting of per diem allowance for return; immunity from arrest upheld).

9. *Worth* v *Norton,* 56 S.C. 56 (1899); compare *Respublica* v *Duane,* 4 Yeates 347 (Sup. Ct. Pa. 1807).

10. *Doty* v *Strong,* 1 Pinn. 84 (Sup. Ct. Wisc. Territ. 1840).

Grand Jury Summons

§ 18.1 The House has determined that a summons issued to a Member to appear and testify before a grand jury while the House is in session invades the rights and privileges of the House.(11)

On Nov. 17, 1941, the House authorized by resolution Mr. Hamilton Fish, Jr., of New York, to appear and testify before a grand jury of the United States District Court for the District of Columbia at such time as the House was not sitting in ses-

11. But see *Gravel* v *U.S.*, 408 U.S. 606 (1972) in which the Supreme Court, in holding a legislative aide not immune from questioning by a grand jury about alleged illegal acts related to the activities of a Senator, implied that the Senator himself would not be immune from a grand jury subpena, and ruled that no constitutional or other privilege shielded the aide or "any other witness" from questioning by a grand jury about alleged illegal activities not implicating legislative conduct. 408 U.S. at 628.

sion.[12] The authorizing resolution was adopted pursuant to the report of a committee that the service of a summons to a Member to appear and testify before a grand jury while the House is in session does invade the rights and privileges of the House of Representatives, as based on article I, section 6 of the Constitution, providing immunities to Members against arrest and against being questioned for any speech and debate in either House.[13] The report indicated, however, that in each case the House may waive its privileges, attaching such conditions to its waiver as it may determine.

After the resolution authorizing Mr. Fish to testify was adopted, there ensued debate on the scope of the immunities of Members.[14] The wording of the subpena in question was drawn into issue, since the subpena stated that once the Member appeared to testify he would not be permitted to depart from the court without leave of the court or of the District Attorney. The House determined by the adoption of the resolution that when the Congress is in session it is the duty of the House to prevent a conflict between the duty of a Member to represent his people at its session and his duty as a citizen to give court testimony.[15]

Similarly, on Feb. 16, 1942,[16] the House authorized Mr. Steven A. Day, of Illinois, to appear and testify before a grand jury of the U.S. District Court for the District of Columbia when the House was not sitting in session. The summons to Mr. Day was raised as a question of personal privilege in the House.

§ 18.2 A Member, having received a subpena to testify for the government before a

12. H. Res. 340, from the Committee on the Judiciary, 87 CONG. REC. 8933, 8934, 77th Cong. 1st Sess.

13. The report, from the Committee on the Judiciary, was read into the Record at 87 CONG. REC. 8933. The committee has been empowered by H. Res. 335, 77th Cong. 1st Sess., to "investigate and consider whether the service of a subpena or any other process by a court or a grand jury purporting to command a Member of this House to appear and testify invades the rights and privileges of the House of Representatives."

14. 87 CONG. REC. 8934, 8949–58.

15. H. REPT. NO. 1415, 87 CONG. REC. 8933 and the remarks of Mr. Emanuel Celler (N.Y.), 87 CONG. REC. 8935, 8936.

For a critical analysis of the resolution adopted in relation to the grand jury appearance of Mr. Fish, see Redfield, The Immunities of Congress from Process, 10 Geo. Wash. L. Rev. 513 (Mar. 1942).

16. 88 CONG. REC. 1267, 77th Cong. 2d Sess.

grand jury, refused to answer the subpena under his privilege as a Member of the House, but stated he would make an effort to meet with the grand jury when the House was not in session.

On May 3, 1949,[17] Mr. Harold H. Velde, of Illinois, informed the House that he had been served with a subpena issued by a federal grand jury sitting in New York City demanding that he appear to testify in relation to an alleged violation of a conspiracy statute. He further stated:

> Mr. Speaker, most of the Members of the House are more familiar than I with the procedure of grand juries and other courts in subpenaing Members of Congress while it is in session. It appears at this time that the debate and discussion and vote on labor legislation here will continue during the time I am called to appear before the grand jury; therefore I shall use my prerogative as a Member of Congress and refuse to answer this subpena. For the record, however, I want to say that I shall make every attempt to meet with the grand jury in New York City and give it any information I may have concerning the matters they are now investigating.[18]

Parliamentarian's Note: Mr. Velde did appear before the grand jury in New York City the following weekend after having made telephonic arrangements with the foreman of the grand jury.

17. 95 CONG. REC. 5544, 5545, 81st Cong. 1st Sess.

18. *Id.* at p. 5544.

Subpena of Member as Witness

§ 18.3 Certain Members having been subpenaed by the defendant to appear as witnesses in a contempt of Congress case, the House adopted a resolution authorizing them to appear at such time when the House was not sitting in session.[19]

On Feb. 23, 1948, Mr. John S. Wood, of Georgia, arose to state a question of the privilege of the House, and laid before the House subpenas to testify, obtained by the defendant, in a contempt of Congress case, addressed to himself and to three other Members of

19. In *U.S.* v *Cooper,* 4 U.S. (4 Dall.) 341 (Cir. Ct. D. Pa. 1800), it was held that there is no privilege such as to exempt Members of Congress from the service, or obligation, of a subpena obtained by a defendant in a criminal case. Justice Chase stated that every man charged with an offense was entitled to compulsory process to secure the attendance of his witnesses.

See also *Gravel* v *U.S.,* 408 U.S. 606, 615 (1972) (dicta that Members of Congress not immune from service of process as witness in a criminal case).

the House.[20] After some debate, the House agreed to Resolution No. 477, authorizing the Members to appear in court at such time as the House was not sitting in session:

> Whereas Representatives John S. Wood, J. Hardin Peterson, John R. Murdock, and Gerald W. Landis, Members of this House, have been subpenaed to appear as witnesses before the District Court of the United States for the District of Columbia to testify at 10 a.m. on the 24th day of February 1948, in the case of the *United States* v. *Richard Morford,* Criminal No. 366–47; and
>
> Whereas by the privileges of the House no Member is authorized to appear and testify but by the order of the House: Therefore be it
>
> *Resolved,* That Representatives John S. Wood, J. Hardin Peterson, John R. Murdock, and Gerald W. Landis are authorized to appear in response to the subpenas of the District Court of the United States for the District of Columbia in the case of the *United States* v. *Richard Morford* at such time as when the House is not sitting in session; and be it further
>
> *Resolved,* That a copy of these resolutions be transmitted to the said court as a respectful answer to the subpenas of the said court.[1]

In explanation of the resolution, Mr. Earl C. Michener, of Michigan, referred to the precedent set on Nov. 17, 1941, when the House adopted a similar resolution, in reference to grand jury subpenas.[2] He further stated:

> First, the Constitution lodges a discretion in the House. This resolution simply exercises that discretionary power. This privilege can only be waived by the House, and not by the individual Member. It seems that Members of some committees have been voluntarily appearing in response to subpenas to appear in court. No question was raised. The right of the House to function and the right of Members to be present and vote must not be interfered with.[3]

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20. 94 CONG. REC. 1557, 1558, 80th Cong. 2d Sess.

1. For similar resolutions adopted by the House upon the service of subpenas to Members in congressional contempt cases, see 99 CONG. REC. 1658, 83d Cong. 1st Sess., Mar. 5, 1953; 97 CONG. REC. 11571, 82d Cong. 1st Sess., Sept. 18, 1951; 97 CONG. REC. 6084, 82d Cong. 1st Sess., June 4, 1951; 94 CONG. REC. 4347, 80th Cong. 2d Sess., Apr. 12, 1948; 94 CONG. REC. 4264, 80th Cong. 2d Sess., Apr. 8, 1948; and 94 CONG. REC. 2224, 80th Cong. 2d Sess., Mar. 5, 1948.

2. See § 18.1, supra.

3. 94 CONG. REC. 1559, 80th Cong. 2d Sess.

When Members are subpenaed to appear as witnesses in civil cases, where they are named as parties, the House may adopt resolutions authorizing them to appear when the House is not sitting in session (see 100 CONG. REC. 10904, 83d Cong. 2d Sess., July 19, 1954; 100 CONG. REC. 1675–77, 83d Cong. 2d Sess., Feb. 12, 1954).

§ 18.4 Where Members and employees of the House were subpenaed to testify in a private civil suit alleging damage from acts committed in the course of their official duties, the House referred the matter to the Committee on the Judiciary to determine whether the rights of the House were being invaded.[4]

On Mar. 26, 1953,[5] the House was informed of the subpena of members and employees of the Committee on Un-American Activities in a civil suit contending that acts committed in the course of an investigation of the committee had injured the plaintiffs. The House by resolution (H. Res. 190) referred the matter to the Committee on the Judiciary to investigate whether the rights and privileges of the House, as based upon the immunities from arrest and of speech and debate, were being invaded:

> Whereas Harold H. Velde, of Illinois; Donald L. Jackson, of California; Francis E. Walter, of Pennsylvania; Morgan M. Moulder, of Missouri; Clyde Doyle, of California; and James B. Frazier, Jr., of Tennessee, all Representatives in the Congress of the United States; and Louis J. Russell and William Wheeler, employees of the House of Representatives, have been by subpenas commanded to appear on Monday and Tuesday, March 30 and 31, 1953, in the city of Los Angeles, Calif., and to testify and give their depositions in the case of *Michael Wilson et al.* v *Loew's Incorporated et al.*, an action pending in the Superior Court of the State of California in and for the County of Los Angeles; and
>
> Whereas the complaint in the aforesaid case of *Michael Wilson et al.* v *Loew's Incorporated et al.*, lists among the parties defendant therein John S. Wood, Francis E. Walter, Morgan M. Moulder, Clyde Doyle, James B. Frazier, Harold E. Velde, Barnard W. Kearney, Donald L. Jackson, Charles E. Potter, Louis J. Russell, and William Wheeler; and

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4. Congressmen are not immune from the service or obligation of summonses or subpenas when named as defendants in civil cases, *Long* v *Ansell,* 293 U.S. 76 (1934). Contempt may lie against a Congressman for refusing to obey a subpena when named as a defendant in a civil case. *James* v *Powell,* 274 N.Y.S. 2d 192, 26 App. Div. 2d 295 (1966), aff'd, 277 N.Y.S. 2d 135, 18 N.Y. 2d 931, 223 N.E. 2d 562 (1966), motion to modify order granted, 279 N.Y.S. 2d 972, 19 N.Y. 2d 813, 226 N.E. 2d 705 (1967). See also *Yuma Greyhound Park, Inc.* v *Hardy,* 472 P.2d 47 (Ariz. 1970); *James* v *Powell,* 250 N.Y.S. 2d 635, 43 Misc. 2d 314 (1964); *People on Complaint of James* v *Powell,* 243 N.Y.S. 2d 555, 40 Misc. 2d 593 (1963); *Worth* v *Norton,* 56 S.C. 56 (1899); *Howard* v *Citizen Bank & Trust Co.,* 12 App. D.C. 222 (1898); *Bartlett* v *Blair,* 68 N.H. 232 (1894).

5. 99 CONG. REC. 2356–58, 83d Cong. 1st Sess.

Whereas part III of said complaint reads as follows:

"At all times herein mentioned defendant John S. Wood was the chairman of the Committee on Un-American Activities, United States House of Representatives; defendants Francis E. Walter, Morgan M. Moulder, Clyde Doyle, James B. Frazier, Harold E. Velde, Barnard W. Kearney, Donald L. Jackson, and Charles E. Potter were members of the said committee; Louis J. Russell was senior investigator of said committee; William Wheeler was an investigator of said committee and 41 Doe, 42 Doe, 43 Doe, 44 Doe, 45 Doe, 46 Doe, 47 Doe, 48 Doe, 49 Doe, and 50 Doe were representatives of said committee.

"At all times mentioned herein and with respect to the matters hereinafter alleged the defendants named in the preceding paragraph acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities"; and

Whereas part V of said complaint contains an allegation that "on and prior to March 1951 and continuously thereafter defendants herein and each of them conspired together and agreed with each other to blacklist and to refuse employment to and exclude from employment in the motion picture industry all employees and persons seeking employment in the motion-picture industry who had been or thereafter were subpenaed as witnesses before the Committee on Un-American Activities of the House of Representatives . . ."; and

Whereas article I, section 6, of the Constitution of the United States provides: "They (the Senators and Representatives) shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same . . . and for any speech or debate in either House, they (the Senators and Representatives) shall not be questioned in any other place"; and

Whereas the service of such process upon Members of this House during their attendance while the Congress is in session might deprive the district which each respectively represents of his voice and vote; and

Whereas the service of such subpenas and summons upon Members of the House of Representatives who are members of a duly constituted committee of the House of Representatives, and the service of such subpenas and summons upon employees of the House of Representatives serving on the staff of a duly constituted committee of the House of Representatives, will hamper and delay if not completely obstruct the work of such committee, its members, and its staff employees in their official capacities; and

Whereas it appears by reason of allegations made in the complaint in the said case of *Michael Wilson, et al.* v *Loew's Incorporated, et al.,* and by reason of the said processes hereinbefore mentioned the rights and privileges of the House of Representatives may be infringed:

Resolved, That the Committee on the Judiciary, acting as a whole or by subcommittee, is hereby authorized and directed to investigate and consider whether the service of the processes

aforementioned purporting to command Members, former Members, and employees of this House to appear and testify invades the rights and privileges of the House of Representatives; and whether in the complaint of the aforementioned case of *Michael Wilson, et al.* v *Loew's Incorporated, et al.*, the allegations that Members, former Members, and employees of the House of Representatives acting in their official capacities as members of a committee of the said House conspired against the plaintiffs in such action to the detriment of such plaintiffs, and any and all other allegations in the said complaint reflecting upon Members, former Members, and employees of this House and their actions in their representative and official capacities, invade the rights and privileges of the House of Representatives. The committee may report at any time on the matters herein committed to it, and until the committee shall report and the House shall grant its consent in the premises the aforementioned Members, former Members, and employees shall refrain from responding to the subpenas or summons served upon them.

The committee or any subcommittee thereof is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, and to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued over the signature of the chairman or by any member designated by him, and may be served by any person designated by such chairman or member. The committee is authorized to inure all expenses necessary for the purposes hereof, including but not limited to expenses of travel and subsistence, employment of counsel and other persons to assist the committee or subcommittee, and if deemed advisable by the committee, to employ counsel to represent any and all of the Members, former Members, and employees of the House of Representatives named as parties defendant in the aforementioned action of *Michael Wilson, et al.* v *Loew's Inc., et al.*, and such expenses shall be paid from the Contingent Fund of the House of Representatives on vouchers authorized by said committee and signed by the chairman thereof and approved by the Committee on House Administration; and be it further

Resolved, That a copy of these resolutions be transmitted to the Superior Court of the State of California in and for the county of Los Angeles as a respectful answer to the subpenas of the said court addressed to the aforementioned Members, former Members, and employees of the House of Representatives, or any of them.

Mr. John W. McCormack, of Massachusetts, stated in reference to the resolution that "for the House to take any other action would be fraught with danger, for otherwise there is nothing to stop any number of suits being filed against enough Members of the House, and in summoning them, to impair the efficiency of the House of Representatives or the Senate to act and function as leg-

islative bodies." He also stated that the fact that the Members and employees subpenaed were presently in California in the performance of their official duties was immaterial, as they were "out there on official business, and committees of this body are the arms of the House of Representatives." (6)

Summons to Member as Defendant

§ 18.5 The receipt by a Member of a summons to appear before a court for a traffic violation gave rise to a question of privilege of the House, and the House authorized the Member to appear when the House was not in session.(7)

On Apr. 13, 1953,(8) Mr. Clare E. Hoffman, of Michigan, stated a question of the privilege of the House when he informed the House that he had been summoned to appear before a court in Maryland in connection with an alleged traffic violation. Mr. Hoffman stated that under the precedents of the House, he was unable to comply with the summons without the consent of the House. He then submitted a resolution authorizing him to appear when the House was not sitting in session and stated that he would at some future time which suited the convenience of the court appear and submit to its decision.

The House agreed to the resolution.(9)

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6. *Id.* at p. 2357.

7. For the proposition that the clause granting Congressmen immunity from arrest does not apply to criminal cases and proceedings, see *Williamson* v *U.S.*, 207 U.S. 425 (1908) (constitutional words "treason, felony and breach of the peace" except from the privilege all criminal offenses); *Gravel* v *U.S.*, 408 U.S. 606 (1972) (applies only to arrests in civil suits) (dictum); *Long* v *Ansell*, 293 U.S. 76 (1934) (applies only to arrests in civil suits) (dictum); *Burton* v *U.S.*, 169 U.S. 283 (1905) (no application to felonies) (dictum); *U.S.* v *Wise*, 1 Hayward and Hazleton 82, 28 F Cases 16,746a (1848) (no application to breach of the peace); *State* v *Smalls*, 11 S.C. 262 (1878) (no application to criminal indictment in state court).

8. 99 CONG. REC. 3013, 3014, 83d Cong. 1st Sess.

9. See Legislative Immunity, Arrest Under Motor Vehicle Code, Limits of the Legislative Immunity, 7 U. Pitt. L. Rev. 150 (Jan. 1941).